

**IN THE CONSOLIDATED ARBITRATION UNDER CHAPTER ELEVEN  
OF THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA)  
AND THE UNICITRAL ARBITRATION RULES**

**Award on Jurisdiction**

<b>by the Arbitral Tribunal:</b>	Prof. Dr. Böckstiegel, Chairman Mr. James Bacchus Ms. Lucinda A. Low
<b>Claimants:</b>	The Canadian Cattlemen for Fair Trade
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## ABBREVIATIONS

BIT	Bilateral Investment Treaty
C I	Claimants' Reply Memorial on the Preliminary Question of January 30, 2007
C II	Claimants' Rejoinder Memorial on the Preliminary Issue of July 5, 2007
FTA	Free Trade Agreement
ICSID	International Centre for Settlement of Investment Disputes
M	Submission of the United Mexican States pursuant to NAFTA Article 1128 of March 1, 2007
NAFTA	North American Free Trade Association
p.	Page
¶	Paragraph
PO I	Procedural Order No. 1
PO II	Procedural Order No. 2
PO III	Procedural Order No. 3
PO IV	Procedural Order No. 4
R I	Respondent's Memorial on the Preliminary Issue of December 1, 2006
R II	Respondent's Reply Memorial on the Preliminary Issue of May 1, 2007
Tr	Transcript of hearing on Jurisdiction
UNCITRAL	United Nations Commission on International Trade Law
VCLT	Vienna Convention on the Law of Treaties of May 23, 1969

## **A. The Parties**

### **The Claimants**

Under the common name of *The Canadian Cattlemen for Fair Trade*, the Claimants in this case are:

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<b>5</b>	George and Ruth Alton (Procter) Sharon Nivins (Alton)	RR# 7, Lucknow, ON
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<b>7</b>	Glen Armitage Cattle Co. Ltd. Rex Armitage Ranching Ltd. Armitage Feed Lots Inc.	#18 4700 Fountain Dr, Red Deer, AB
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<b>10</b>	Douglas Briggs Earl Briggs	1064 Line 10 North, RR#2 Hawkestone, ON
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<b>17</b>	Ron Coulter	RR#1, Creemore, ON
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<b>20</b>	Fermin Declerq	Box 256, Lomond, AB
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<b>22</b>	Robert Emerson	RR# 3, Ripley, ON
<b>23</b>	Brent Fisher	RR# 4, Goderich, ON
<b>24</b>	Kevin Frieburger	RR# 1, Elmwood, ON
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<b>38</b>	G. Lee Hochstein Marie-Helene Hochstein (von Meerheimb)	Box 1166,Pincher Creek,AB
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<b>42</b>	Ian Johnston, Murray Johnston Laura Johnston (Duclos) Audrey Johnston (Wheeler)	RR# 2,Bluevale,ON



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## **B. The Tribunal**

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## **C. Short Identification of the Case**

1. The short identification below is without prejudice to the full presentation of the factual and legal details of the case by the Parties and the Tribunal's considerations and conclusions.

### **C.I. The Claimants' Perspective**

2. The following quotation from the Claimants' Reply Memorial on the Preliminary Question summarizes the main aspects of the dispute as follows (C I, ¶¶ 7 – 16):

*”7. As acknowledged by the Respondent at p. 2 of its submission and elaborated in each of the Claimant's Notices of Arbitration, the Claimants are all Canadian nationals engaged in beef and cattle business. These businesses include: feedlot operations and other cattle-related operations including cow-calf production, back-grounding, finishing, custom feeding, agency/brokerage as well as secondary transportation and crop production activities. The establishment of the North American Free Trade Area within which the continental market for live cattle, and the North American cattle herd, have grown was the intended result of the economic integration underlying the NAFTA. Each of the Claimants has made investments in this live cattle market and each has suffered serious economic losses as a result of the Respondent's measures, which continue to unfairly discriminate against Canadian participants in favour of their U.S. counterparts competing in the very same integrated market.*

#### *A. Discriminatory Measures*

8. *Effective May 20, 2003, the United States has maintained prohibitions and restrictions on Canadian-origin livestock and beef products. These U.S. measures have included:*
  - (a) *an absolute ban on the transport, shipment and sale of certain Canadian-origin livestock from May 20, 2003 to July 14, 2005;*



- (b) *an absolute ban on the transport, shipment and sale of certain Canadian-origin cattle 30 months of age and older;*
  - (c) *an absolute ban on the transport and sale of all Canadian-origin pregnant heifers;*
  - (d) *the implementation of a costly, onerous, and discriminatory certification process; and*
  - (e) *a ban on the transportation and sale of bovine meat products derived from bovines 30 months of age and older in the United States.*
9. *From May 20, 2003 to July 14, 2005, the United States imposed and maintained an absolute prohibition on the shipment of live cattle from Canada under the authority of the Animal Health Protection Act (AHPA). This ban was imposed in spite of abundant evidence that Canadian-origin livestock and beef products were safe and posed minimal risk of BSE to the United States.*
10. *U.S. authorities commenced an unnecessary and lengthy rule-making process in May 2003 that supported a ban on shipments of livestock and certain beef products from the Canadian portion of the North American Free Trade Area to the American portion for 26 months. During that 26-month period, the Claimants suffered significant economic losses. Even when the Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture (USDA) determined that Canadian-origin livestock and beef products represented a minimal risk to the U.S. portion of the industry, significant restrictions remained in place. These restrictions have been maintained in spite of the fact that U.S. authorities have recognized that Canadian authorities have the necessary safeguards already in place.*
11. *The rule-making process engendered additional frustration and delay by means of judicial action by protectionist industry members in the United States.*
12. *Until January 2005 Final Rule, politics had intervened to trump sound science, the World Organization on Animal Health (“OIE”) guidelines for international trade, and the NAFTA. Even now, significant restrictions have remained in place for political reasons that have put the Claimants at a competitive disadvantage with their U.S. competitors and have added increased costs and delays to their operations. These include:*
- (a) *a prohibition on the transport and sale of certain Canadian-origin livestock 30 months of age and over;*

- (b) *a prohibition on the sale and transport of Canadian-origin pregnant heifers;*
  - (c) *costly certification procedures for live cattle under 30 months of age; and*
  - (d) *a ban on the transportation and sale of bovine meat products derived from bovines 30 months of age and older in the United States.*
13. *These continuing prohibitions and restrictions were and are not justified. In the context of a fully integrated market, they make no sense. The Respondent's actions have consistently failed to account for the fact that Canadian- and U.S. origin cattle have long since become intermingled and therefore form a single, North American herd.*
14. *During the period 1999-2003, 3.9 million live slaughter cattle and 1.1 million feeder cattle were sent from Canada to the United States. Over 150,000 slaughter cattle were sent from the United States to Canada. In addition, large numbers of breeding cattle moved in both directions across the border and Canada had maintained a steady trade in the exportation of dairy heifers. In 2002 alone, well over 550,000 Canadian feeder cattle and calves had been exported to the United States and, given that the majority of these were exported late in 2002, it can be concluded that on May 20, 2003, there were over 200,000 live feeder and breeding cattle in U.S. herds and feedlots that had been born in Canada. Simply put, only protectionists or the misinformed could speak of "Canadian" or "American" herds prior to imposition of the Respondent's ban and its subsequent modifications. There was one, North American, herd.*
15. *It was not until January 4, 2007 that U.S. officials finally announced a proposed set of amendments to the January 2005 Final Rule. If adopted, those amendments would purportedly re-open the Respondent's border to live cattle from Canada 30 months of age or older. These proposed changes, however, have not yet come into effect. The basis for relaxing the restrictions on imports of Canadian cattle that continue to apply under the Final Rule – that Canadian regulations protecting against the introduction of BSE in the North American cattle herd are as sound as U.S. safeguards – was just as valid in May 2003 as it is in January 2007.*
16. *The continued ban on Canadian-origin cattle and beef products was never justified or reasonable in the circumstances. Those circumstances include:*
- (a) *the science of risk regulation;*

- (b) *integration of the North American market for live cattle and beef products;*
- (c) *regulatory homogeneity extant between Canadian and American regulatory regimes; and*
- (d) *the compliance of Canada's regulations with the OIE international guidelines."*

## **C.II. The Respondent's Perspective**

3. Apart from the Respondent's objections to jurisdiction which are described in a separate section below, the following quotation from the Respondent's First Memorial on the Preliminary Issue summarizes the main aspects of the dispute as follows (R I, p. 2):

*"Claimants are Canadian nationals engaged in the operation of cattle feedlots and other cattle-related business in Canada. They seek to challenge the United States' ban on the importation of Canadian cattle that was instituted on May 20, 2003 after the discovery of bovine spongiform encephalopathy ("BSE") in a cow in Alberta, Canada. They maintain that the United States is obligated under NAFTA Article 1102(1) to accord national treatment to Canadian investors with respect to their investments in Canada, that the ban breached this obligation, and that by reason of this alleged breach they incurred losses when the profitability and value of their cattle-related investments in Canada decreased. Claimants assert that they are eligible to have their claims for damages resolved under the dispute resolution provision of Chapter Eleven because their investments, even though not located in the United States, are located within the NAFTA free trade area.*

*The United States has no obligation under the NAFTA with respect to claimants' investments in Canada. It neither has the obligation to provide national treatment to those investments, nor the obligation to arbitrate claims relating to them."*

## **D. Procedural History**

4. On March 16, 2005 the Claimants sent the first notices of arbitration to the Respondent, notifying it of Claimants' claims and initiating recourse to arbitration in accordance with Article 3 UNCITRAL Rules of Arbitration and NAFTA Articles 1116 and 1120.
5. Between March 16, 2005 and June 2, 2005, 109 different notices of arbitration reached the Respondent, seeking damages of varying amounts, ranging from CAN\$ 38,000 to CAN\$ 95 million. In total, the damages sought by the Claimants amount to approximately US \$ 235 million.
6. During a conference call on August 15, 2006, the Parties agreed to the informal consolidation of the claims before a single tribunal.
7. By a joint letter of August 23, 2006, the Parties put on record that they had respectively appointed Mr. James Bacchus and Ms. Lucinda Low as party-appointed members of the Tribunal and that they now appointed Prof. Karl-Heinz Böckstiegel as Presiding Arbitrator in the above-mentioned consolidated claims. Thereby, the Tribunal was constituted.
8. By letter of August 31, 2006, the Parties were sent an annotated preliminary agenda for the First Procedural Meeting to be held on September 21, 2006. The Tribunal invited the Parties to try to agree on a place for such a meeting convenient to most of the Parties in accordance with UNCITRAL Rule 16.
9. On September 5, 2006, the Respondent informed the Tribunal that it was unavailable on the proposed date, and asked for alternative dates. By e-mail of September 6, 2006, the Claimants suggested possible dates for a meeting either in New York or Washington, D.C. The Chairman replied to the Parties by letter of

September 15, 2006 that a meeting on October 3, 2006 would be most convenient for the Tribunal, again inviting the Parties to agree on a place for the meeting.

10. On September 24, 2006, the Chairman confirmed that the Procedural Meeting would be held in Washington, D.C. on October 3, 2006, and attached an annotated agenda for the meeting.
11. By joint letter of September 28, 2006, the Parties settled on the location of the First Procedural Meeting in Washington, D.C., agreed on a preliminary phase of the proceedings, and jointly proposed a timetable for this preliminary phase.
12. The First Procedural Meeting with the Parties took place on October 3, 2006 at the Army & Navy Club in Washington, D.C. This place was chosen without prejudice to the Place of Arbitration for reasons of convenience for most of the Parties in accordance with UNCITRAL Rule 16. Present at the meeting were the members of the Tribunal as well as Michael Woods and Todd Grierson-Weiler, representing the Claimants, and Mark Clodfelter, Andrea Menaker, and Jennifer Thornton, representing the Respondent.
13. By e-mail of October 10, 2006, a draft of the First Procedural Order was sent to the Parties, giving them the opportunity to submit comments. On October 13, 2006, the Respondent proposed certain amendments to the draft by e-mail with which the Claimants concurred by e-mail of October 17, 2006.
14. On October 20, 2006, Procedural Order (PO) No.1 regarding the further procedure was issued, confirming the established timetable and taking into account the results of the discussion and the agreements reached between the Parties at the First Procedural Meeting. Since it gives an outline of the agreed procedure, its full text is provided hereafter:

*“This PO puts on record results of the discussion and agreement between the Parties and the Tribunal at the 1st Procedural Meeting in Washington DC on October 3, 2006 taking into account as well the*

*Parties' Joint Letter of September 28, 2006 and the further comments received from the Parties on the draft of this Order.*

1. Attendance

- 1.1. *Names of all attending the meeting were notified in advance and are highlighted in the following sections 1.2 and 1.3.*
- 1.2. *The representation of the Parties in this procedure is as follows (UNCITRAL Rule 4):*

*Counsel for Claimants:*

**Mr. Michael Woods**  
*Gottlieb & Pearson  
Suite 1920, 2020 University Street  
Montreal, Quebec, H3A 2A5  
Canada  
Tel. 001 (514) 288-1744, ext. 238  
Cell: 001 (514) 889-6637  
Fax 001 (514) 288-6629  
woods@gottliebpearson.com  
paradis@gottliebpearson.com*

*Ms. Martha Harrison  
Gottlieb & Pearson  
Toronto  
Canada  
Tel. 001(416) 250-1 550, ext. 140  
Fax 001 (416) 250-7889  
harrison@gottliebpearson.com*

**Prof. Todd Grierson-Weiler**  
*Calgary, Alberta  
Tel. 001 (202) 580-8 193  
Fax 001 (3 09) 2 10-2353  
tgw@naftaclaims.com*

*Counsel for Respondent:*

**Mr. Mark Clodfelter**  
*Assistant Legal Adviser  
Office of International Claims and Investment Disputes,  
Ms. Andrea Menaker  
Chief of the NAFTA Arbitration Division  
Tel. 001 (202) 776-845 1  
Fax 001 (202) 776-8481  
Ms. Jennifer Thornton  
Mr. Keith J. Benes*

*Office of the Legal Adviser  
U.S. Department of State  
Suite 203, South Building, 2430 E Street NW  
Washington, D.C. 20037-2800  
United States  
clodfelterm@state.gov  
menakeraj@state.gov  
thorntonj@state.gov  
beneskj@state.gov*

*1.3. The Arbitral Tribunal appointed by the Parties consists of:*

*Co-Arbitrators:*

***Mr. James Bacchus***  
*Greenberg Traurig, P.A.  
800 Connecticut Avenue NW  
Suite 500  
Washington DC 20006  
Tel. 001 (202) 530-8530  
bacchusj@gtlaw.com  
HysonF@gtlaw.com*

***Ms. Lucinda A. Low***  
*Steptoe & Johnson LLP  
1330 Connecticut Ave., NW  
Washington, DC 20036  
Ph: 202-429-8051  
Fax: 202-429-3902  
llow@steptoe.com  
jshapiro@steptoe.com*

*Chairman of Tribunal:*

***Prof. Dr. Karl-Heinz Böckstiegel***  
*Parkstr. 38  
D-51427 Bergisch-Gladbach  
Tel. +49-(0)2204-66268  
Fax +49-(0)2204-21812  
khboeckstiegel@aol.com*

*2. Communications (UNCITRAL Rule 13.3)*

*2.1. The Tribunal shall address communications to Lead-Counsel of the Parties. E-mail communications will be addressed to all Counsels of the Parties. Courier mail will be addressed to the Lead-Counsel indicated by each Party.*

2.2. *Counsel of the Parties shall address communications directly to each member of the Tribunal with a copy to Counsel for the other Party*

*by e-mail, to allow direct access during travels,*

*and confirmed either by courier or fax (but fax communications shall not exceed 15 pages).*

2.3. *To facilitate word-processing and citations in the deliberations and later decisions of the Tribunal, the e-mail transmission of briefs and substantial or longer submissions shall be in Windows Word, or in a PDF document that can be word-searched and from which text can be copied and pasted into Windows Word.*

2.4. *In view of the different law offices used by counsel of Claimants, the Parties have agreed that Respondent shall send its courier communications only to Mr. Woods.*

2.5. *Deadlines for submissions shall be considered as complied with if the submission is received by the Tribunal and the other Party in electronic form or by courier on the respective date.*

2.6. *Longer submissions shall be preceded by a Table of Contents.*

2.7. *To facilitate that parts can be taken out and copies can be made, submissions of all documents including statements of witnesses and experts shall be submitted separated from Memorials, unbound in binders and preceded by a list of such documents consecutively numbered with consecutive numbering in later submissions (C-1, C-2 etc. for Claimants; R-1, R-2 etc. for Respondents) and with dividers between the documents. As far as possible, in addition, documents shall also be submitted in electronic form (preferably in Windows Word to facilitate word processing and citations).*

### 3. Particulars Regarding the Procedure

3.1 *The Procedure shall be in accordance with the Rules of NAFTA Chapter 11 and the UNCITRAL Arbitration Rules currently in force.*

3.2 *The applicable substantive law shall be as determined by NAFTA Rule 1131 and UNCITRAL Rule 33.*



- 3.3. *The language of the arbitral procedure shall be English.*
- 3.4. *The Parties have agreed that the place of the arbitration is Washington, D.C.*
- 3.5. *The city where the Hearing on the Preliminary Issue will be held will be decided by the Tribunal after the Parties have filed submissions in this regard by October 31, 2006.*
- 3.6. *The Parties have agreed on a bifurcated procedure to the effect that, in a first stage of the procedure, the Tribunal shall only deal with a “Preliminary Issue” which the Parties have defined as follows:*

*“Does this Tribunal have jurisdiction to consider claims under NAFTA Article 1116 for an alleged breach of NAFTA Article 1102(1) where all of the Claimants’ investments at issue are located in the Canadian portion of the North American Free Trade Area and the Claimants do not seek to make, are not making and have not made any investments in the territory of the United States of America?”*

*The Parties agree that a negative determination of this question will dispose of all of Claimants’ claims in their entirety.*

*The Parties also agree that any other objections of a potentially jurisdictional nature shall be reserved for a single merits phase should the claims not be dismissed at the preliminary phase.”*

- 3.7. *The Parties have further agreed as follows regarding Confidentiality:*

*“Either Party may make public the written submissions, hearing transcripts, and orders and awards generated during the course of this arbitration, except to the extent that they refer to confidential information – in which case any such text shall be redacted prior to being made public.*

*If either Party submits any document containing confidential information, it shall designate it as such and, where practicable, provide a redacted version of the document that may be released to the public. Where a Party refers to a document that has been designated confidential in its written submission, it shall provide a redacted version of the submission that may be released to the public.*

*The Parties agree to endeavor to make arrangements for a one-way video-conference transmission of all substantive hearings including the hearing on the Preliminary Issue so that those hearings may be viewed by the public in a room separate from the hearing room.”*

4. Consolidation

- 4.1. *The Parties have agreed that all claims of Canadian citizens and corporations referred to in the “Notices of Arbitration and Statement of Claim” submitted between March 16 and June 2, 2005 and listed by name and address in Claimants’ “Litigants List”, and listed as well by Respondent on its website as “Cases Regarding the Border Closure due to BSE Concerns”, shall be consolidated before and decided by this Tribunal.*
- 4.2. *All Claimants are represented by the same Counsel as mentioned above.*

5. Timetable

*For the first stage of this bifurcated procedure, the following timetable has been set:*

- 5.1. *For the purposes of the procedure on the Preliminary Issue, the Parties agree that the Statements of Claim submitted by the Claimants between March 16 and June 2, 2005, are a sufficient basis for Respondent to present its objections in detail.*

*By October 31, 2006 the Claimants shall submit*

*a CD containing all Statements of Claim*

*and a binder, with a table of contents, containing one full Statement of Claim together with copies of those parts of the other Statements of Claim which differ from the first one.*

- 5.2. *By December 1, 2006, the Respondent shall file its Memorial with all its objections regarding the Preliminary Issue together with all evidence (documents, witness statements, expert statements) it wishes to rely on.*

- 5.3. *By January 30, 2007, the Claimants file their Reply Memorial on the Preliminary Issue with any evidence (documents, witness statements, expert statements) they wish to rely on.*
- 5.4. *By March 1, 2007, Art. 1128 submissions and/or Amicus submissions, if any, may be filed.*
- 5.5. *By May 1, 2007, the Respondent files its Rebuttal Memorial on the Preliminary Issue with any further evidence (documents, witness statements, expert statements), but only in rebuttal to Claimant's Reply memorial or regarding new evidence.*
- 5.6. *By July 5, 2007, the Claimants file their Rebuttal Memorial on Jurisdiction with any further evidence (documents, witness statements, expert statements), but only in rebuttal to Respondent's Reply memorial or regarding new evidence.*
- 5.7. *Thereafter, no new evidence may be submitted, unless agreed between the Parties or expressly authorized by the Tribunal.*
- 5.8. *By July 12, 2007*
  - \* *the Parties submit notification of witnesses and experts presented by themselves or by the other Party they wish to examine at the Hearing*
  - \* *the Parties inform the Tribunal of the arrangements made for the transcript of the Hearing*
- 5.9. *On July 17, 2007, a Pre-Hearing Conference between the Parties and the Tribunal shall be held, if considered necessary by the Tribunal, either in person or by telephone.*
- 5.10. *As soon as possible thereafter, Tribunal issues a Procedural Order regarding details of the Hearing.*
- 5.11. *From October 9 to 11, 2007, Hearing on the Preliminary Issue of up to 3 days.*
- 5.12. *By dates set at the end of the Hearing, if considered appropriate by the Tribunal after consultation with the Parties, Parties shall submit Post-Hearing Briefs of up to 30 pages (no new documents allowed unless agreed by the Parties or admitted by the Tribunal).*

## 6. Evidence Rules

*The Parties and the Tribunal may use, as an additional guideline, the “IBA Rules on the Taking of Evidence in International Commercial Arbitration”, always subject to changes considered appropriate in this case by the Tribunal.*

7. Documentary Evidence

- 7.1. *All documents (including texts and translations into English of all substantive law provisions, cases and authorities) considered relevant by the Parties shall be submitted with their Memorials, as established in the Timetable.*
- 7.2. *All documents shall be submitted in the form established above in the section on communications.*
- 7.3. *New factual allegations or evidence shall not be any more permitted after the respective dates for the Rebuttal Memorials indicated in the above Timetable unless agreed between the Parties or expressly authorized by the Tribunal.*
- 7.4. *Documents in a language other than English shall be accompanied by a translation into English.*

8. Witness Evidence

- 8.1. *Written Witness Statements of all witnesses shall be submitted together with the Memorials mentioned above by the time limits established in the timetable.*
- 8.2. *In order to make most efficient use of time at the Hearing, written Witness Statements shall generally be used in lieu of direct oral examination though exceptions may be admitted by the Tribunal. Therefore, insofar as, at the Hearing, such witnesses are invited by the presenting Party or asked to attend at the request of the other Party, the available hearing time should mostly be reserved for cross-examination and re-direct examination, as well as for questions by the Arbitrators.*

9. Expert Evidence

*Should the Parties wish to present expert testimony, the same procedure would apply as to witnesses.*

10. Hearing on the Preliminary Issue

*Subject to changes in view of the further procedure up to the Hearing:*

- 10.1. *The dates of the hearing shall be those given in the above timetable.*

- 10.2. *The city where the Hearing is to be held shall be decided by the Tribunal according to section 3.5.above.*
- 10.3. *As soon as possible after the Tribunal's decision on the city, the Parties shall submit a joint proposal regarding the location of the Hearing which, failing such agreement shall be decided by the Tribunal.*
- 10.4. *The Parties may present opening statements of not more than three hours.*
- 10.5. *No new documents may be presented at the Hearing. But demonstrative exhibits may be shown using documents submitted earlier in accordance with the timetable.*
- 10.6. *Taking into account the time available during the period provided for the Hearing in the timetable, the Tribunal intends to establish equal maximum time periods both for the Claimants and for the Respondent which the Parties shall have available. Changes to that principle may be applied for at the latest at the time of the Pre-Hearing Conference.*
- 10.7. *All substantive hearings including the Hearing on the Preliminary Issue shall be simultaneously transcribed using a live transcription software system, with the delivery to the parties and members of the Tribunal of daily transcripts each evening after the close of the hearing.*

*Procedural hearings shall be recorded, but not transcribed, unless otherwise agreed.*

*The Parties, who shall share the respective costs, shall try to agree on and make the necessary arrangements in this regard. With regard to the Hearing on the Preliminary Issue, the Parties shall inform the Tribunal accordingly before the time of the Pre-Hearing Conference as provided in the timetable.*

- 10.8. *Should the Parties be presenting a witness or expert not testifying in English and thus requiring interpretation, they are expected to provide the interpreter unless agreed otherwise. Should more than one witness or expert need interpretation, to avoid the need of double time for successive interpretation, simultaneous interpretation shall be provided.*

## 11. Extensions of Deadlines and Other Procedural Decisions

- 11.1. *Short extensions may be agreed between the Parties as long as they do not affect later dates in the Timetable and the Tribunal is informed before the original date due.*
- 11.2. *Extensions of deadlines shall only be granted by the Tribunal on exceptional grounds and provided that a request is submitted immediately after an event has occurred which prevents a Party from complying with the deadline.*
- 11.3. *The Tribunal indicated to the Parties, and the Parties took note thereof, that in view of travels and other commitments of the Arbitrators, it might sometimes take a certain period for the Tribunal to respond to submissions of the Parties and decide on them.*
- 11.4. *Procedural decisions will be issued by the chairman of the Tribunal after consultation with his co-arbitrators or, in cases of urgency or if a co-arbitrator cannot be reached, by him alone.*

#### 12. Arbitration Costs (UNCITRAL Rules 38 – 41)

- 12.1. *In accordance with UNCITRAL Rule 38, the Tribunal shall fix the costs of arbitration (fees and expenses).*
- 12.2. *In accordance with UNCITRAL Rule 39, after the consultation with the Parties during the Washington meeting, the Tribunal fixes the fees of the members of the Tribunal to be US-Dollars 500.00 per hour.*
- 12.3. *The Tribunal may appoint an Administrative Secretary. The respective fees and expenses of the Administrative Secretary shall be costs of arbitration.*
- 12.4. *In accordance with UNCITRAL Rule 41, the Tribunal has requested and received from each Party an equal amount as an advance for the costs of arbitration to the trust account of the Chairman of the Tribunal.*

#### 14. Results of the Procedural Meeting

*The Parties, within one week after receiving the draft for this Procedural Order, were given an opportunity to submit comments. Taking into account the comments received, the Tribunal has issued this Order.*

15. By e-mail of October 26, 2006, the Claimants submitted a Claims Binder in accordance with paragraph 5.1 of Procedural Order No.1, containing one full Statement of Claim and copies of Claimant-specific information from all the Statements of Claim which differ from the full one together with a CD containing all the Statements of Claim.
16. Pursuant to paragraph 3.5 of Procedural Order No.1, the Parties filed submissions with respect to the place where the October 31, 2006 Preliminary Hearing should be held, and proposed Calgary, Alberta, and Washington, D.C., respectively.
17. On November 7, 2006, Procedural Order No.2 regarding the place of the hearing on the Preliminary Issue was issued. Since the issue of the place of the hearing was a matter of particular concern to the Parties, the full text of the Order is provided hereafter :

*“1. The Tribunal has carefully examined the arguments and considerations submitted by the Parties regarding the selection of the place of the Hearing on the Preliminary Issue presented at the Procedural Meeting in Washington D.C. held on October 3, 2006 (recorded in the transcript) and supplemented by their letters of October 31, 2006.*

*2. The Tribunal finds that the Parties have introduced and dealt with all arguments and considerations relevant in this context and that there is no need to repeat all these.*

*3. From these, the major considerations on which the Tribunal bases its decision in this matter are the following:*

*3.1. As recorded in section 3.4. of PO No.1 of October 20, 2006, the Parties have agreed that Washington D.C. is the place of arbitration according to Art. 16 UNCITRAL Rule in this case. To hold hearings in places other than the official place of arbitration is on one hand possible under the UNCITRAL Rules, but, in the view of the Tribunal, would require compelling arguments for such a choice.*

*3.2. The Tribunal notes that the Parties have agreed that there is no reason from the standpoint of location of evidence to hold the Hearing in Calgary. The only specific argument in favor of choosing Calgary as the*

*place of the Hearing is the proximity to the residences and work places of most Claimants in this consolidated case. However, since the Parties agreed at the Washington meeting that attendance of the more than 100 Claimants in the Hearing Room itself is not warranted or intended, and section 3.7. of PO No.1 records only the agreement on a one-way video conference transmission to a separate room, the Tribunal considers that a transmission from a Hearing in Washington D.C. to a separate room in Calgary could serve the same purpose. Respondent has informed the Tribunal that such a video transmission from Washington D.C. to Calgary can be arranged, and Claimants have not contested this.*

4. *Therefore, the Tribunal decides as follows:*

4.1. *The Hearing on the Preliminary Issue shall be held in Washington D.C.*

4.2. *The Parties shall try to agree on a joint proposal at which location the Hearing can be held in Washington D.C. at the agreed dates, and shall inform the Tribunal of this proposal by January 30, 2007.*

4.3. *The Parties shall try to agree on arrangements for a one-way video transmission of the Hearing to a room in Calgary where Claimants can view the proceedings, and shall inform the Tribunal in this regard by January 30, 2007”*

18. On December 1, 2006, the Respondent submitted its First Memorial on the Preliminary Issue (R I) together with copies of the documents relied upon in the Memorial.
19. On January 30, 2007, the Claimants submitted their Reply Memorial on the Preliminary Question (C I) together with copies of the documents relied upon in the Memorial.
20. Pursuant to NAFTA Article 1128, on March 1, 2007, the United Mexican States filed a submission commenting on certain issues of interpretation that have arisen in the present case.



21. On May 1, 2007, the Respondent submitted its Reply Memorial on the Preliminary Issue (R II).
22. On July 5, 2007, the Claimants submitted their Rejoinder Memorial on the Preliminary Issue (C II).
23. By e-mail of July 29, 2007, a draft of Procedural Order No. 3 was sent to the Parties, again inviting them to submit comments. Both Claimants and Respondent by letters of August 2, 2007, expressed their agreement with this draft.
24. On August 3, 2007, Procedural Order No. 3 was issued regarding the details of the forthcoming hearing. In view of its relevance to understand the conduct of the hearing and its transcript, its full text of the Order is provided hereafter :

*“After both Claimants and Respondent, by letters of August 2, 2007 have expressed their agreement with the draft of this PO, it is now issued in its final form:*

*1. Earlier Rulings*

*The Tribunal recalls the following agreements and earlier rulings in this procedure which remain valid unless changed by this Order:*

*1.1. From PO No.1:*

*5.11. From October 9 to 11, 2007, Hearing on the Preliminary Issue of up to 3 days.*

*10.4. The Parties may present opening statements of not more than three hours.*

*10.5. No new documents may be presented at the Hearing. But demonstrative exhibits may be shown using documents submitted earlier in accordance with the timetable.*

*10.6. Taking into account the time available during the period provided for the Hearing in the timetable, the Tribunal intends to establish equal maximum time periods both for the Claimants and for the Respondent which the Parties shall have available. Changes to that principle may be applied for at the latest at the time of the Pre-Hearing Conference.*

10.7. All substantive hearings including the Hearing on the Preliminary Issue shall be simultaneously transcribed using a live transcription software system, with the delivery to the parties and members of the Tribunal of daily transcripts each evening after the close of the hearing.

Procedural hearings shall be recorded, but not transcribed, unless otherwise agreed.

The Parties, who shall share the respective costs, shall try to agree on and make the necessary arrangements in this regard. With regard to the Hearing on the Preliminary Issue, the Parties shall inform the Tribunal accordingly before the time of the Pre- Hearing Conference as provided in the timetable.

1.1. From PO No.2:

4.1. The Hearing on the Preliminary Issue shall be held in Washington D.C.

4.2. The Parties shall try to agree on a joint proposal at which location the Hearing can be held in Washington D.C. at the agreed dates, and shall inform the Tribunal of this proposal by January 30, 2007.

4.3. The Parties shall try to agree on arrangements for a one-way video transmission of the Hearing to a room in Calgary where Claimants can view the proceedings, and shall inform the Tribunal in this regard by January 30, 2007.

1.2. Agreement on location and video transmission

By Claimants' letter of January 30, 2007, the Tribunal was notified that the Parties had agreed to hold the Hearing at the Army and Navy Club of Washington D.C. located at 901, 17th Street N.W. and that board room facilities at the Calgary, Alberta, offices of Hennan Blaikie will serve as the place where Claimants can view the proceedings via one way video transmission.

1.3. Agreement on Transcript

By Claimants' letter of July 12, 2007, the Tribunal was notified that the Parties would shortly report on the final arrangements regarding the simultaneous transcription of the oral Hearing.

2. In order to facilitate references to exhibits the Parties rely on in their oral presentations, and in view of the great number of exhibits submitted by the Parties to avoid that each member of

*the Tribunal has to bring all of them to the Hearing, the Parties are invited to bring to the Hearing:*

*for the other Party and for each member of the Tribunal Hearing Binders of those exhibits or parts thereof on which they intend to rely in their oral presentations at the hearing, together with a separate consolidated Table of Contents of the Hearing Binders of each Party, for the use of the Tribunal, one full set of all exhibits the Parties have submitted in this procedure, together with a separate consolidated Table of Contents of these exhibits.*

3. The Agenda of the Hearing shall be as follows:

- 3.1. *Short Introduction by Chairman of Tribunal.*
- 3.2. *Opening Statement by Respondent of up to 3 hours.*
- 3.3. *Opening Statement by Claimants of up to 3 hours.*
- 3.4. *Questions by the Tribunal, and suggestions regarding particular issues to be addressed in more detail in Parties' 2nd Round Presentations.*
- 3.5. *2nd Round Presentation by Respondent of up to 2 hours.*
- 3.6. *2nd Round Presentation by Claimants of up to 2 hours.*
- 3.7. *Final questions by the Tribunal.*
- 3.8. *Discussion on whether Post-Hearing Briefs are deemed necessary and of any other issues of the further procedure.*

*Members of the Tribunal may raise questions at any time considered appropriate.*

4. Timing (unless otherwise agreed at the beginning of or during the Hearing):

*1st day: Start at 9:00.*

*Agenda items 3.1. and 3.2.*

*After lunch: Agenda items 3.3. and 3.4.*

*Depending on the actual time used by the Parties for their Opening Statements, coffee breaks and the lunch break will be taken at convenient times.*

*2nd day: Start at 9:00.*

*Continuation of Agenda item 3.4., if found to be necessary, and Agenda items 3.5. to 3.8., if they can be completed on that day, with coffee breaks and a lunch break at a convenient time.*

*3rd day: As foreseen in PO No.1, October 11 will also be blocked for a continuation of the Hearing if that is found to be necessary in consultation between the Parties and the Tribunal during the course of the earlier parts of the hearing.*

5. *The Parties are invited to submit, by September 14, 2007, a list of the names and functions of the persons who will be attending the Hearing from their respective sides.”*
25. On behalf of both sides, by Claimants’ letter of August 29, 2007, the Tribunal was notified that the Parties had made the final arrangements regarding the simultaneous transcription of the oral hearing by a court reporter.
26. By their letters of September 14, 2007, and in addition, by Claimant’s e-mail of October 2, 2007, the Parties notified the Tribunal of their respective attendees at the hearing.
27. On October 9–10, 2007, the hearing on the Preliminary Issue was held in Washington, D.C. In addition to the members of the Tribunal, the following persons were in attendance (TR. 3 et seq.):

*On behalf of the Claimant:*

*MR. MICHAEL G. WOODS*

*MS. MARTHA L. HARRISON*

*MR. RAJEEV SHARMA*

*Heenan Blaikie, LLP*

*1250 René-Lévesque Blvd. West*

*Suite 2500*

*Montréal, Québec H3B 4Y1*

*(514) 846-3427*

*PROF. TODD GRIERSON-WEILER*

*950 Central Avenue N.E.*

*Suite 239*

*Calgary, Alberta T2E 0P3*

*(202) 517-1597*

*MR. ALAN S. ALEXANDROFF*

*125 Colin Avenue*

*Toronto, Ontario M5P 2C4*

*(416) 617-9627*

*MR. DAVID R. HAIGH, Q.C.*

*Burnet, Duckworth & Palmer, LLP*

*1400, 350 7th Avenue S.W.*

*Calgary, Alberta, T2P 3N9*

*(403) 260-0100*

*On behalf of the Respondent:*

*MR. RONALD J. BETTAUER*

*Deputy Legal Adviser*

*MS. ANDREA J. MENAKER*

*Chief, NAFTA Arbitration Division,*

*Office of International Claims and*

*Investment Disputes*

*MR. KENNETH BENES*

*MS. JENNIFER THORNTON*

*MS. HEATHER VAN SLOOTEN*

*MR. MARK FELDMAN*

*MR. JEREMY SHARPE*

*Attorney-Advisers, Office of International Claims and*

*Investment Disputes*

*Office of the Legal Adviser*

*U.S. Department of State*

*Suite 203, South Building*

*2430 E Street, N.W.*

*Washington, D.C. 20037-2800*

(202) 776-8443

*On behalf of the U.S. Department of the Treasury:*

*MR. GARY SAMPLINER*

*1500 Pennsylvania Avenue, N.W.*

*Washington, D.C. 20220*

*(202) 622-1946*

*On behalf of the U.S. Department of Justice:*

*MS. MAAME A. F. EWUSI-MENSAH*

*Commercial Litigation Branch*

*1100 L Street, N.W.*

*Room 12000*

*Washington, D.C. 20530*

*(202) 353-0503*

*On behalf of the Government of Canada:*

*MS. CAROLYN ELLIOTT-MAGWOOD*

*MS. CHRISTINA BEHARRY*

*Investment Trade Policy Division*

*125 Sussex Drive*

*Ottawa, Ontario K1A 0G2*

*(613) 944-8975*

*On behalf of the United Mexican States:*

*SR. SALVADOR BEHAR*

*Secretaria de Economia*

*Trade and NAFTA Office*

*1911 Pennsylvania Avenue, N.W.*

Washington, D.C. 20006

(202) 728-1707

The Meeting followed the Agenda as provided in Section 3 of Procedural Order No. 3 cited above.

The details of the hearing were provided in the Transcript which was delivered on a daily basis during the hearing, and again following the hearing in both electronic and paper format. At the end of the hearing, the Chairman of the Tribunal asked the Parties whether they had any objections regarding the method and way the Tribunal conducted this case so far, and the Parties replied that there was none (Tr. 333).

28. After the hearing, an e-mail by the Chairman of the Tribunal of October 16, 2007 recalled what further actions had been agreed:

*“Dear colleagues,*

*hoping that you all returned well from the Hearing in Washington, let me just recall some points regarding further action agreed at the end of the Hearing which are also recorded in the transcript:*

- 1. The Parties agreed to send to the Tribunal, within about a week after the Hearing, **CDs of their Hearing Binders.***
- 2. By **November 8, 2007**, both the Claimants and the Respondent shall submit **Claims for their costs of arbitration.***
- 3. By **November 15, 2007**, the Parties may submit **comments** regarding the cost claim submitted by the other side.*
- 4. By mail of October 11, 2007, you received copies of the **invoice sent by the court reporting service.** As agreed, I have today ordered*

*my bank to transfer from the trust account for this case the amount of the invoice to the account of World Wide Reporting LLP.*

*Sincerely*

*Karl-Heinz Böckstiegel*

Chairman of Tribunal”

29. By November 8, 2007, both the Claimants and the Respondent submitted Claims for their respective costs of arbitration to the Tribunal.
30. By November 15, 2007, both the Claimants and the Respondent submitted comments regarding the cost claim submitted by the other side.



## **E. The “Preliminary Issue”**

31. The following quotation from PO No. 1 summarizes the Preliminary Issue agreed upon by the Parties (PO No. 1, ¶ 3.6):

*“3.6. The Parties have agreed on a bifurcated procedure to the effect that, in a first stage of the procedure, the Tribunal shall only deal with a “Preliminary Issue” which the Parties have defined as follows:*

*“Does this Tribunal have jurisdiction to consider claims under NAFTA Article 1116 for an alleged breach of NAFTA Article 1102(1) where all of the Claimants’ investments at issue are located in the Canadian portion of the North American Free Trade Area and the Claimants do not seek to make, are not making and have not made any investments in the territory of the United States of America?*

*The Parties agree that a negative determination of this question will dispose of all of claimants’ claims in their entirety.*

*The parties also agree that any other objections of a potentially jurisdictional nature shall be reserved for a single merits phase should the claims not be dismissed at the preliminary phase.”*

## **F. The Principal Relevant Legal Provisions**

### **F.I. North American Free Trade Agreement (NAFTA)**

32. The principal relevant legal provisions of the NAFTA are set out below:

*“Preamble*

*The Government of Canada, the Government of the United Mexican States and the Government of the United States of America, resolved to:*

*STRENGTHEN the special bonds of friendship and cooperation among their nations;*

*CONTRIBUTE to the harmonious development and expansion of world trade and provide a catalyst to broader international cooperation;*

*CREATE an expanded and secure market for the goods and services produced in their territories;*

*REDUCE distortions to trade;*

*ESTABLISH clear and mutually advantageous rules governing their trade;*

*ENSURE a predictable commercial framework for business planning and investment;*

*BUILD on their respective rights and obligations under the General Agreement on Tariffs and Trade and other multilateral and bilateral instruments of cooperation;*

*ENHANCE the competitiveness of their firms in global markets;*

*FOSTER creativity and innovation, and promote trade in goods and services that are the subject of intellectual property rights;*

*CREATE new employment opportunities and improve working conditions and living standards in their respective territories;*

*UNDERTAKE each of the preceding in a manner consistent with environmental protection and conservation;*

*PRESERVE their flexibility to safeguard the public welfare;*

*PROMOTE sustainable development;*

*STRENGTHEN the development and enforcement of environmental laws and regulations; and*

*PROTECT, enhance and enforce basic workers' rights;*

*HAVE AGREED as follows:*

#### *Article 102*

##### *Objectives*

1. *The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency are to:*
  - (a) *eliminate barriers to trade in, and facilitate the cross border movement of, goods and services between the territories of the Parties;*
  - (b) *promote conditions of fair competition in the free trade area;*
  - (c) *increase substantially investment opportunities in the territories of the Parties*
  - (d) *provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory;*
  - (e) *create effective procedures for the implementation and application of this Agreement, and for its joint administration and the resolution of disputes; and*
  - (f) *establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement.*
2. *The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.*

#### *Article 1101*

##### *Scope*

1. *This Chapter applies to measures adopted or maintained by a Party relating to:*
  - (a) *investors of another Party;*

- (b) *investments of investors of another Party in the territory of the Party*
- (c) *with respect to Article 1106, all investments in the territory of the Party*

2. ...

3. ...

4. ...

#### *Article 1102*

##### *National Treatment*

1. *Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.*
2. *Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.*
3. *The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by such state or province to investors, and to investments of investors, of the Party of which it forms a part.*
4. *for greater certainty, no Party may:*
  - (a) *impose on an investor of another Party a requirement that a minimum level of equity in an enterprise in the territory of the Party be held by its nationals, other than nominal qualifying shares for directors or incorporators of corporations; or*
  - (b) *require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment in the territory of the Party.”*

#### *Article 1106*

##### *Performance Requirements*

1. *No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the*

*establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory:*

2. ...
3. ...
4. ...
5. ...
6. ...

*Article 1109  
Transfers*

1. *Each Party shall permit all transfers relating to an investment of an investor of another Party in the territory of the Party to be made freely and without delay. Such transfers include:*
2. ...
3. ...
4. ...
5. ...
6. ...

*Article 1110  
Expropriation and Compensation*

1. *No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:*
2. ...
3. ...
4. ...
5. ...
6. ...

7. ...

8. ...

#### *Article 1112*

##### *Relation to Other Chapters*

1. *In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.*
2. *A requirement by a Party that a service provider of another Party post a bond or other form of financial security as a condition of providing a service into its territory does not of itself make this Chapter applicable to the provision of that crossborder service. This Chapter applies to that Party's treatment of the posted bond or financial security.*

#### *Article 1116*

##### *Claim by an Investor of a Party on Its Own Behalf*

1. *An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:*
  - (a) *Section A or Article 1503(2) (State Enterprises), or*
  - (b) *Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,*

*and that the investor has incurred loss or damage by reason of, or arising out of, that breach.*
2. *An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.*

#### *Article 1131*

##### *Governing Law*

1. *A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.*
2. *An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.*

*Article 1139*

*Definitions*

*For purposes of this Chapter:*

...

*investment means:*

- (a) *an enterprise;*
- (b) *an equity security of an enterprise;*
- (c) *a debt security of an enterprise*
  - (i) *where the enterprise is an affiliate of the investor, or*
  - (ii) *where the original maturity of the debt security is at least three years,**but does not include a debt security, regardless of original maturity, of a state enterprise;*
- (d) *a loan to an enterprise*
  - (i) *where the enterprise is an affiliate of the investor, or*
  - (ii) *where the original maturity of the loan is at least three years,**but does not include a loan, regardless of original maturity, to a state enterprise;*
- (e) *an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;*
- (f) *an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d);*
- (g) *real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and*
- (h) *interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under*
  - (i) *contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or*
  - (ii) *contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;*

*but investment does not mean,*

- (i) *claims to money that arise solely from*
  - (i) *commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or*
  - (ii) *the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or*
- (j) *any other claims to money,*

*that do not involve the kinds of interests set out in subparagraphs (a) through (h);*

*investment of an investor of a Party means an investment owned or controlled directly or indirectly by an investor of such Party;*

*investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment;*

*...”*

## **F.II. Vienna Convention on the Law of Treaties (VCLT)**

33. The principal relevant legal provisions of the VCLT are as follows:

*“Article 31*

*General rule of interpretation*

1. *A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*
2. *The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*
  - (a) *any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*
  - (b) *any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*
3. *There shall be taken into account, together with the context:*
  - (a) *any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
  - (b) *any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*
  - (c) *any relevant rules of international law applicable in the relations between the parties.*
4. *A special meaning shall be given to a term if it is established that the parties so intended.*



*Article 32*

*Supplementary means of interpretation*

*Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:*

- (a) leaves the meaning ambiguous or obscure; or*
- (b) leads to a result which is manifestly absurd or unreasonable.”*

## **G. Relief Sought by the Parties Regarding the Preliminary Issue**

### **G.I. Relief Sought by Respondent Regarding the Preliminary Issue**

34. As identified in the First Memorial (R I, p. 20) and restated in the Second Memorial on the Preliminary Issue (R II, p. 34) the Respondent asks the Tribunal to render an award as follows:

*“For the foregoing reasons, The United States respectfully requests that this Tribunal render an award in favour of the United States and against claimants, dismissing claimants’ claims in their entirety for lack of jurisdiction.”*

35. At the hearing (Tr. pp. 59–60, 320), the Respondent confirmed its request, asking the Tribunal to render an award as follows:

*“So, in conclusion, Mr. President and Members of the Tribunal, there is no basis on which Claimants can go forward in this proceeding. The question that the Tribunal set out in paragraph 3.6. of Procedural Order Number 1 must be answered in the negative. The United States thus respectfully requests that the Tribunal dismiss Claimants’ claims for lack of jurisdiction and award the United States full costs and fees.”*

## **G.II. Relief Sought by Claimants Regarding the Preliminary Issue**

36. As identified in the First Memorial (C I, ¶ 125) and restated in the Second Memorial on the Preliminary Issue (C II, ¶ 136) the Claimants request the Tribunal to render an award as follows:

*“For the foregoing reasons, the Claimant Investors hereby request the Tribunal to answer the agreed question in the affirmative and to proceed with the scheduling of a hearing of the merits of this consolidated case.”*

37. At the hearing (Tr. p. 131), Claimants confirmed their request, asking the Tribunal to render an award as follows:

*“Canadian beef producers were adversely affected, and they ask for the opportunity to go to a merits hearing. They ask you to find affirmatively on the question that has been put to you.”*

## **H. Short Summary of Contentions Regarding the Preliminary Issue**

### **H.I. Short Summary of Contentions by Respondent**

38. The Respondent challenges the Tribunal's jurisdiction, raising objections which are best summarized, subject to additional details in later sections regarding particular issues, by quoting the Introductions of Respondent's First and Second Memorial on the Preliminary Issue (R I, pp. 2 – 3; R II, pp. 2 – 4):

*“The United States has no obligation under the NAFTA with respect to claimants’ investments in Canada. It neither has the obligation to provide national treatment to those investments, nor the obligation to arbitrate claims relating to them. As demonstrated below, the NAFTA’s terms read in context and in light of the Treaty’s object and purpose, leave no doubt that the scope and coverage of NAFTA Chapter Eleven extends only to investors that seek to make, are making or have made investments in the territory of the Respondent State, and to the investments those investors own or control. None of the NAFTA Parties undertook any obligation with respect to investments located outside of its territory or with respect to “investors” who are not seeking to make, are not making and have not made investments in its territory.*

*Under Claimants’ interpretation of Chapter Eleven’s scope, every national of a NAFTA Party that believes its business has been adversely affected by a border measure of another NAFTA Party would be an “investor” entitled to invoke Chapter Eleven’s dispute resolution procedures. Such an interpretation would constitute a radical departure from the obligations that the NAFTA Parties, or any State Party to an international investment agreement, have ever undertaken with respect to foreign investors. It would create an avenue for direct claims against states by foreign nationals for matters that are, like the claims here, quintessentially trade disputes, in clear circumvention of the mechanisms provided in NAFTA Chapter Twenty and elsewhere for the resolution of such disputes through State-to-State dispute settlement procedures. Nothing in the NAFTA supports such a result (R I, pp. 2 – 3)*

*Instead of supporting Claimants' interpretation, as they contend, the uniqueness of Claimants' particular claims, if anything, actually undermines it. Not only have Claimants failed to establish how a treaty's jurisdictional reach can be determined by the unprecedented nature of the claims asserted or the novelty of the jurisdictional theories advanced, the fact that Claimants' claims are unprecedented and novel only highlights in this instance just how farfetched Claimants' claims and theories are.*

*At bottom, Claimants' interpretation is based on untenable premises. First, that the NAFTA Parties, without so much as a single comment by the Agreement's negotiators, the Parties' respective legislatures, the trade press, or academic commentators, created a revolutionary arbitral mechanism for private parties to resolve cross-border trade disputes. Second, that the NAFTA Parties intended to extend the protections of Chapter Eleven, including its arbitration provisions, to investors with respect to their home-country investments, even though the Parties expressly, and concededly, did not extend those protections to those home-country investments themselves, a differentiation that makes no sense. Third, that the NAFTA Parties contemplated that each Party actually could regulate the formalities of establishing enterprises in the territories of the other Parties.*

*None of these premises is correct and, in their Reply Memorial, Claimants have failed to address the manifestly absurd and unreasonable results that obtain under an interpretation that would have Chapter Eleven apply to measures relating to "investors" with respect to their non-foreign investments. Indeed, Claimants' entire argument is that such measures are within Chapter Eleven's scope of application, which is contained in Article 1101(1), because Article 1102(1) – a substantive provision that grants national treatment to investors with respect to "the establishment, acquisition, expansion, management, conduct, operation, and sale of other disposition of investments" – applies wherever those investments are located. But not only do Claimants fail to explain how the meaning of Article 1101 is determined by their interpretation of Article 1102(1), they also fail to show that that interpretation is correct in the first place.*

*All of the Parties to the Agreement have expressly disavowed Claimants' erroneous interpretation. In seeking to overcome the NAFTA Parties' own statement contradicting Claimants' revolutionary interpretation of the NAFTA, Claimants contend that "[s]tatements by the parties, of their alleged intent behind a treaty provision, are neither relevant nor credible. Claimants' contention is not only unsupported, it is refuted by all pertinent authority, which, consistent with common sense, holds that the Parties' common and concordant statements of their intent with respect to a treaty provision provide the best evidence of the meaning of that provision. Each of the three NAFTA Parties has specifically disclaimed any intent to provide*

*national treatment to “investors” of the other Parties with respect to investments made in their home territories.*

*Furthermore, although Claimants purport to rely upon the object and purpose of the NAFTA, they have failed to produce any evidence that the protection of domestic investors of other Parties with respect to their home-country investments was among the Parties’ objectives. Given the enormous financial burden that Claimants’ interpretation could impose on the NAFTA Parties, it is inconceivable that they would have embraced such an objective without significant consideration, negotiation, and deliberation.*

*Lacking any direct evidence, Claimants urge this Tribunal to infer that the Parties had such an objective by relying on the language in the NAFTA’s Preamble and the general objectives stated in Article 102. But Claimants have failed to establish the link between the degree of economic integration the Parties hoped to achieve with the Agreement and the scope of investor protection in the NAFTA’s investment chapter, or any rationale for why the NAFTA Parties would so dramatically depart from their habitual treaty practice.*

*As discussed below, Chapter Eleven – interpreted in accordance with the relevant rules of international law, the NAFTA Parties’ subsequent practice, in context and in light of the Treaty’s object and purpose – does not grant national treatment to investors who never invested, and never sought to invest, in the territory of the Respondent NAFTA Party. For all these reasons, the Tribunal should accept the NAFTA Parties’ authentic interpretation of the NAFTA and should reject Claimants’ invitation to substitute a new and radical interpretation of the Parties’ Agreement (R II, pp. 2 – 4).*

## **H.II. Short Summary of Contentions by Claimants**

39. The main arguments of Claimants can best be summarized, subject to further details in later sections regarding particular issues, by quoting paragraphs 3 to 6 of the Introduction in Claimants’ First Memorial on the Preliminary Question (C I, ¶¶ 3-6):

”3. *The answer to the question is yes. The Tribunal has jurisdiction to proceed to a hearing of the merits of the consolidated claims, based on the applicable rules of international law. The Tribunal has jurisdiction because:*

- (a) *the Claimants' interpretation of Article 1102(1) is fully supported by Article 31 of the Vienna Convention on the Law of Treaties ("VCLT") which provides that treaties are to be interpreted in accordance with their ordinary meaning, in context, and that such interpretation is to be guided by the object and purpose of the treaty.*
  - (b) *the terms of Article 1102(1), interpreted within their proper context and in light of the objectives and principles of the NAFTA set out in Article 102(1), are clear and unambiguous: the Claimants are entitled to the most favourable treatment accorded to their U.S.-based competitors by the Respondent without imposing any of the territorial limitations ascribed by the Respondent to them; and*
  - (c) *a review of the drafting history of the applicable NAFTA texts confirms the interpretation established by application of the approach set out in VCLT Article 31.*
4. *The Claimants submit that the Respondent's approach to treaty interpretation is flawed and its position is untenable because the Respondent:*
  - (a) *fails to adhere to the general approach to interpretation of NAFTA Articles 101(1), 1101(1) and 1102(1) required under VCLT Article 31 and customary international law;*
  - (b) *attempts to obscure the sui generis nature of this case;*
  - (c) *relies heavily on irrelevant jurisprudence and academic commentary;*
  - (d) *submits an inapplicable sovereignty principle to the interpretation of the NAFTA;*
  - (e) *makes erroneous claims about the alleged agreement of the Parties on interpretation of the NAFTA; and*
  - (f) *attempts to construct an unsustainable "legal scrub" theory that avoids the obvious import of the available preparatory texts of NAFTA Chapter 11.*
5. *In addition, the Respondent has ignored the facts setting out how and why the Claimants were entitled to rely, and did rely, on the promise of non-discrimination for their participation in the North American Free Trade Area. The investors participated in an integrated continental market fostered through the establishment of the rule of law within the Free Trade Area established by the NAFTA. Their market was subsequently disrupted by the imposition of a measure that was fundamentally at odds with the United States' obligation to promote competition and non-discrimination in the free trade area, contrary to Article 1102(1) of the North American Free trade Area.*
6. *In sum, the ordinary meaning of the NAFTA terms at issue demonstrates why the Respondent is incorrect. The objectives and context within which these terms are situated also demonstrate why*

*the Respondent is incorrect. NAFTA Article 1102(1) is not merely a bilateral investment treaty obligation. It is a NAFTA obligation that binds the United States to provide the Claimants non-discriminatory treatment vis-à-vis investors competing in like circumstances in the North American Free Trade Agreement. It imposes no territorial limitation as to where an investor must invest in order to qualify for protection vis-à-vis other investors. Nothing in the Chapter imposes such a territorial limitation on the Article 1102(1) obligation. Where the drafters intended for territorial limitations to exist in NAFTA Chapter 11, they explicitly included them, such as in Articles 1106 and 1110. Territorial limitations should not be read into the text where none exist, and particularly not when the objectives and the context of the treaty support the opposite conclusion.”*



## **I. Considerations of the Tribunal Regarding the Preliminary Issue**

40. The Tribunal has carefully examined all of the many and extensive arguments of the Parties. What follows deals with those aspects that the Tribunal considers to be the most relevant in their respective context.

### **I.I. Preliminary Considerations**

#### **1. The Preliminary Issue in the Context of Subject-Matter Jurisdiction – *Ratione Materiae* and Consent to International Arbitration**

41. For convenience, the Preliminary Issue is cited again below (PO No.1, ¶ 3.6.):

*“3.6. The Parties have agreed on a bifurcated procedure to the effect that, in a first stage of the procedure, the Tribunal shall only deal with a “Preliminary Issue” which the Parties have defined as follows:*

*“Does this Tribunal have jurisdiction to consider claims under NAFTA Article 1116 for an alleged breach of NAFTA Article 1102(1) where all of the Claimants’ investments at issue are located in the Canadian portion of the North American Free Trade Area and the Claimants do not seek to make, are not making and have not made any investments in the territory of the United States of America?”*

*The Parties agree that a negative determination of this question will dispose of all of claimants’ claims in their entirety.*

*The parties also agree that any other objections of a potentially jurisdictional nature shall be reserved for a single merits phase should the claims not be dismissed at the preliminary phase.”*

42. NAFTA Chapter Eleven provides private parties with direct access to international jurisdiction in the course of investor-State arbitration for an alleged breach of a specified, and exhaustive, list of obligations contained in Section A of Chapter Eleven, but does so only with regard to a circumscribed subject-matter therein. The scope of NAFTA Chapter Eleven is defined in Article 1101, which provides that “[t]his Chapter applies to measures adopted or maintained by a Party relating to (a) investors of another Party; (b) investments of investors of another Party in the territory of the Party [...]”.
43. There is considerable debate between the Parties on the question whether the term “investors of another Party” in Article 1101(1) (a) applies to the Claimants given the location of their investments. The Respondent contends that this Tribunal lacks jurisdiction since the United States did not consent to arbitrate these claims under NAFTA Chapter Eleven as the jurisdictional prerequisite of NAFTA Article 1101 is allegedly not established due to the location of the Claimants’ investments (R I, pp. 4 *et seq*; Tr. p. 21). The Claimants for their part submit that the Tribunal has jurisdiction to entertain their claims as they purportedly fall within the scope of Chapter Eleven in accordance with Article 1101(1)(a) and that the United States, hence, has agreed to be sued in this context (C I, ¶¶ 1 *et seq.*).
44. As regards the fact that the Parties’ dispute, thus, centers on the construction of the term “investor of another Party”, this Tribunal classifies the Preliminary Issue as to be a question of subject-matter jurisdiction – *ratione materiae*. Further details will be discussed in the later section of this Award.

## **2. The Relevance of the Vienna Convention on the Law of Treaties**

45. There is no dispute that the Vienna Convention on the Law of Treaties is applicable to the NAFTA.

46. Under NAFTA Article 1131(1), the Tribunal is required to decide the Preliminary Issue in accordance with NAFTA and the applicable rules of international law. Similarly, NAFTA Article 102(2) sets out that the provisions are to be interpreted and applied in accordance with the applicable rules of international law and in light of the objective of the NAFTA contained in Article 102(1). It is widely acknowledged that the term “applicable rules of international law” comprises the customary international rules of treaty interpretation which are reflected and codified in Articles 31 and 32 of the VCLT.
47. Whereas VCLT Article 31(1) contains the general rule of interpretation according to which a treaty must be interpreted “in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”, VCLT Article 31(2) stipulates that the relevant context includes the treaty’s text, the preamble and annexes and any related agreements or instruments. VCLT Article 32 further provides for recourse to “supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion”.
48. In its further considerations of the specific issues of the case, the Tribunal will follow as closely as possible the order and priority of the various criteria of interpretation provided in VCLT Articles 31 and 32.

### **3. The Relevance of Decisions in Other Cases**

49. Both Parties have cited in argument various decisions and awards by arbitral tribunals for their relevance to the issues currently before this Tribunal. The Tribunal deems it useful to make clear from the outset that it regards its task in these proceedings as the very specific one of arriving at the proper meaning to be given to those particular provisions in the context of the NAFTA in which they appear.

50. On the other hand, Article 32 VCLT permits, as supplementary means of interpretation, not only *preparatory work* and *circumstances of conclusion* of the treaty, but indicates by the word “*including*” that, beyond these two means expressly mentioned, other supplementary means may be applied. Article 38 [paragraph 1.d.] of the Statute of the International Court of Justice provides that judicial decisions are applicable for the interpretation of public international law as “*subsidiary means*”. Therefore, they must be understood to be also *supplementary means of interpretation* in the sense of Article 32 VCLT.
51. That being so, it is not obviously clear how far arbitral decisions are of relevance to the Tribunal’s task. It is at all events plain that the decisions of other tribunals are not binding on this Tribunal, and the Tribunal refers in this connection to paragraphs 73-76 of the Decision on Jurisdiction in *Bayindir Insaat Turizm Ticaret v. Islamic Republic of Pakistan* of November 14, 2005 (ICSID Case No. ARB/03/29). This does not, however, preclude the Tribunal from considering other arbitral decisions and the arguments of the Parties based upon them, to the extent that it may find that they throw useful light on the issues that arise for decision in this case. Such an examination will be conducted by the Tribunal later in this Award, after the Tribunal has considered the Parties’ contentions and arguments regarding the various issues argued and relevant to the interpretation of the NAFTA provisions at stake.

## **I.II. Ordinary Meaning in Light of the Context and Object and Purpose of the NAFTA and of its Negotiating History (Article 31 (1) and 32 VCLT)**

### **1. Arguments by Respondent**

52. First, the Respondent challenges the jurisdiction of this Tribunal, asserting that it did not give its consent to arbitration in this matter as NAFTA *Article 1101(1)(a)* *limits the Chapter’s scope to disputes relating to investors only with respect to*

*investments in the territory of the State that has adopted or maintained the measures at issue* (R I, p. 5; Tr. pp. 21; 288).

53. As regards the ordinary meaning and object and purpose of NAFTA Chapter Eleven, the Respondent contends that Chapter Eleven functions like a bilateral investment treaty (BIT), governing investments of the Parties' respective nationals in the other Parties' territory (R I, p. 6; Tr. pp. 138 *et seq.*). Noting that such BITs create obligations only with regard to investors of contracting states who make investments in the territory of other contracting states, the Respondent asserts that the purpose of a BIT and generally of investment chapters in Free Trade Agreements (FTAs) is *to promote and protect foreign investment* (R I, pp. 6 *et seq.*; Tr. pp. 42, 139). The object and purpose of NAFTA Chapter Eleven is deemed to be no different from these BITs (R II, p. 24; Tr. pp. 29, 139), a view which is allegedly supported by one of NAFTA's objectives in Article 102, which is "to increase substantially investment opportunities in the territories of the Parties" (R I, p. 7; Tr. p. 29). In further support of its contention, the Respondent relies on the award in the *Metalclad* arbitration, where the NAFTA Chapter Eleven Tribunal held that the NAFTA Parties' specific intent was "to promote and increase cross-border investment opportunities" (R I, p. 7; Tr. p. 44). Additionally, this object and purpose of the NAFTA's investment chapter is said to be confirmed by numerous commentators and practitioners (R I, p. 9; Tr. p. 43).
54. Allegedly, this object and purpose of promoting and protecting foreign investment is advanced only if the NAFTA treaty is construed to provide protection only for foreign investments and to foreign investors who have made or are seeking to make investments in the territory of the other treaty partners (R I, pp. 9 *et seq.*; Tr. p. 39). For this reason, the Respondent strongly objects to the Claimants' contention that NAFTA Chapter Eleven also applies to measures relating to investors that have not made, and do not intend to make, investments in the territory of another NAFTA Party. This is said to be inconsistent with the object and purpose of international investment agreements, such as NAFTA Chapter Eleven (R I, p. 10; Tr. p. 44). It is asserted that the Claimants *have failed*

*to produce any evidence that the protection of domestic investors of other Parties with respect to their home-country investments was among the Parties' objectives* (R II, p. 3).

55. To support its view, the Respondent draws upon the award of the ICSID Tribunal in the *Gruslin v. Malaysia* case, which it argues deals with a similar issue and confirms Respondent's interpretation (R I, p. 10, R II, p. 27). In this case, the arbitrator had to deal with a BIT that did not contain a territorial specification in each of its provisions (Tr. pp. 31 *et seq.*, 301). The claimant in the *Gruslin* case purportedly argued that the BIT applied to all investments regardless of their location. The arbitrator in that case, however, rejected the claimant's argument, noting that the "absence of qualifying words of limitation to the word "investment" in Article 10 [the consent article] itself does not broaden the class of investments included by the [investment agreement]." (R I, p. 10; Tr. p. 32). In the present case, the Respondent argues that the Claimants make the same argument by stating that, in the absence of an express territorial limitation, NAFTA Article 1101(1)(a) should be interpreted to apply to all investors, regardless of whether they have established investments in the territory of the United States or in Canada. However, the *Gruslin* tribunal allegedly addressed and *flatly rejected* the argument that "[t]here is no territorial requirement" under Article 25(1) of the ICSID Convention (R II, p. 28), observing that the meaning of the term "investment" had to be "informed by the stated objects" of the BIT (R II, p. 29; Tr. pp. 32, 301). As purportedly in the BIT in that case, one of NAFTA's objectives is to increase opportunities for investors of one Party to make investments in the territories of the other Parties (R II, p. 28). Claimants' attempt to distinguish the *Gruslin* case from the present one is, thus, regarded by the Respondent to be *unavailing* (R II, p. 29). The Respondent, hence, concludes that, *just as in Gruslin, any protection of investors in the NAFTA's investment Chapter is necessarily "confined to the same defined subject matter of investments by nationals of one contracting state in the territory of the other."* (R II, p. 29). Accordingly, the Respondent submits that Claimants' contention *makes no sense in the light of the clear object and purpose* of NAFTA Chapter Eleven, and advises the Tribunal to dismiss the claim for this reason (R I, p. 11).

56. Further, the Respondent draws the attention of the Tribunal to the award in the *Bayview* case, which is alleged to have *squarely addressed and rejected the same arguments* advanced by the Claimants in this arbitration (Tr. p. 32). The *Bayview* Tribunal found that it was “quite plain that NAFTA Chapter Eleven was not intended to provide substantive protections or rights of action to investors whose investments are wholly confined to their own national States in circumstances where those investments may be affected by measures taken by another NAFTA State Party.” (Tr. pp. 33 *et seq.*). The *Bayview* Tribunal further held that in order to be an investor within the meaning of NAFTA Article 1101(1)(a), an enterprise must make an investment in another NAFTA State, not in its own (Tr. p. 170; 294). Adopting the terminology of the *Methanex* award, the Tribunal in *Bayview* found that there needed to be a legally significant connection between the investment and the State applying the contested measure (Tr. p. 170) for NAFTA Chapter Eleven to be applicable.
57. Moreover, Claimants’ recourse to the NAFTA’s preamble and the general objectives stated in Article 102(1) is deemed by the Respondent to be fruitless as the Claimants allegedly *have failed to establish the link between the degree of economic integration the Parties hoped to achieve with the Agreement and the scope of investor protection in the NAFTA’s investment chapter* (R II, pp. 4, 22 *et seq.*). Although the preamble and the objectives contained in Article 102 may inform the construction of provisions in NAFTA Chapter Eleven, they are not capable of transforming the nature of those obligations, or of imposing independent ones on the treaty signatories (R II, pp. 21 *et seq.*; Tr. pp. 299 *et seq.*).
58. From the fact that every other FTA to which the Respondent is a party *contains objectives and/or preamble language identical or similar to those contained in the NAFTA*, the Respondent concludes that the mere creation of a free trade area does not necessitate Claimants’ interpretation of Article 1102(1) (R II, p. 29; Tr. pp. 181 *et seq.*). It is argued that a comparative approach to treaty interpretation was also applied by the ICJ in the *Oil Platforms* case (Tr. pp. 188 *et seq.*) and by

the Tribunal in the *ADF* decision (Tr. p. 191). However, allegedly, none of the other agreements could be interpreted in the manner the Claimants suggest (Tr. p. 138). The Respondent cites both the Chile-U.S. FTA and the DR-CAFTA as examples of U.S. FTAs which *do not extend national treatment to investors that do not have investments or do not seek investments in the territory of another Party* despite the fact that both of them contain goals similar to those of the NAFTA, particularly the establishment of a Free Trade Area (R II, p. 30; Tr., pp. 182 *et seq.*).

59. In agreement with the Article 1128 submission of the United Mexican States (Mexico), the Respondent notes that though most NAFTA chapters seek to eliminate barriers at the border in form of tariffs and non-tariffs barriers to trade in goods and services, Chapter Eleven purportedly targets internal barriers to economic integration in the form of investment restrictions, helping foreign investors to establish themselves in the other NAFTA Parties' territories governed by legal regimes with which they are unfamiliar (R II, pp. 25 *et seq.*; Tr. pp. 29, 39). This purpose of the NAFTA is said to be promoted by Respondent's interpretation of Chapter Eleven's scope in compliance with the objectives set out in Article 102 and the resolutions included in the preamble (R II, p. 26).
  
60. Claimants' suggestion that the Respondent's interpretation undermines the NAFTA's objectives is said to reveal *a fundamental misconception about how the Agreement is structured* (R II, p. 23). First, the Respondent asserts that the Claimants' distinction between the text of Article 102(1) (c) and that of Article 102(1) (d) is erroneous, and assures that there is no difference in meaning between the phrases "in the territories of the Parties" and "in each Party's territory" (R II, p. 24). The only significant distinction in the language of the Article 102 objectives is deemed to be between Article 102(b), which focuses on promoting conditions of fair competition "in the free trade area", and Articles 102(a), (c) and (d), which all refer to the territories of the Parties respectively (R II, p. 24).



61. Furthermore, the Respondent contends that granting Claimants' claims for damages because of the adoption of a ban on imports by the Respondent would ignore that *the NAFTA Parties specifically negotiated a detailed State-to-State consultation and dispute resolution mechanism to address such external barriers to trade* (Tr. p. 30), and would *frustrate the express provisions of Chapter Seven, as well as the Parties' intention that such disputes be subject to State-to-State arbitration* (R II, p. 23; Tr. pp. 156 *et seq.*, 198). In this context, domestic investors have the option of presenting such complaints to their own government, which may decide to initiate a consultation, State-to-State arbitration, or the GATT dispute settlement mechanism (Tr. pp. 31 and 163 *et seq.*).
62. All in all, the Respondent submits that its *interpretation is entirely consistent with the over-arching object and purpose of the Agreement and the Agreement's stated objectives* (R II, p. 31; Tr. p. 36).
63. Regarding the context (Articles 31(1) and (2) VCLT), the Respondent contends that the Tribunal's lack of jurisdiction over Claimants' claims is also obvious from the context in which the terms of Article 1101(1)(a) must be read. Claimants' suggestion that Chapter Eleven's scope extends to any investor that has made an investment is rejected by the Respondent, arguing that the term "investor of a Party" in Article 1101(1)(a) *cannot be read in isolation* (R I, p. 11; Tr. pp. 37, 289). Read in context, it is purported that the term *clearly means an investor that has made, or is seeking to make, an investment in the territory of another NAFTA Party* (R II, p. 15).
64. The interpretive context of Article 1101 is said to be provided by the other substantive obligations contained in Section A of NAFTA Chapter Eleven (R I, p. 11). In this context, the Respondent first notes that most of the obligations contained in Section A of NAFTA Chapter Eleven address the protection for investments, while some others, such as Article 1102(1), provide protection for investors (R I, p. 11). The Respondent further elaborates that any such provision obligating a Party to provide a certain level of treatment to investors does so only with respect to the investor's investments in the territory of the State that has

adopted or maintained the measure at issue (R I, p. 12; Tr. p. 39). As it is alleged that the NAFTA *nowhere obligates a Party* to provide a certain level of treatment to investors that have not made or are not seeking to make investments in another State, it would consequently *def[y] logic to interpret Article 1101(1)(a) – the scope and coverage provision – more expansively than the scope of any of the substantive obligations* (R I, p. 12).

65. Particularly, the Respondent addresses Article 1102(1), which provides for national treatment of investors. Allegedly, this national treatment provision must be read to apply only to investors that have made or are seeking to make investments in another NAFTA Party, for *any other reading would lead to absurd results* (R I, p. 12; Tr. pp. 28 *et seq.*, 51). The Claimants' attempts to read the term "with respect to investments" out of the text of Article 1102(1) and to import the words "in like circumstances" instead is deemed by the Respondent to be an inquiry relating to the merits for a national-treatment claim — which cannot inform the Tribunal's jurisdiction (Tr. pp. 290 *et seq.*).
  
66. Respondent notes that in the case of a Canadian investor establishing an investment in the United States, the United States would be obliged pursuant to Article 1102 (1), to accord national treatment to the investor with respect to the investment and also, in accordance with Article 1102(2), to provide such treatment to the investor's investment (R I, p. 12) as well. However, the Respondent further maintains that no obligation to accord national treatment would apply with regard to the investment of a Canadian investor in Canada, as Article 1101(1)(b) explicitly provides that only *investments of investors in the territory of the Party that adopted or maintained the measure* are covered by NAFTA Chapter Eleven. Consequently, the Respondent rejects Claimants' notion that the United States is obliged under Article 1102(1) to accord national treatment to a Canadian investor, whose only investments are in Canada. According to the Respondent, this theory *would lead to the absurd result that the United States would have no obligation to accord national treatment to Canadian-owned investments in Canada, yet would have an obligation to accord national treatment to Canadian "investors" with respect to those very same*

*investments* (R I, p. 13; R II, pp. 2 *et seq.*, 18 *et seq.*; Tr. p. 297). As this *cannot be sustained*, the Respondent contends that the term “investors of a Party” in Article 1101(1) (a) must be read to apply only to those investors that are seeking to make, are making or have made an investment in the territory of another NAFTA Party (R I, p. 13). This conclusion is said to be confirmed by the *Bayview* award (Tr. pp. 51 *et seq.*). Claimants’ contrary interpretation is said to provide an *unbalanced protection* while failing to offer a reasonable explanation therefor (R II, pp. 18 *et seq.*).

67. In support of its interpretation, the Respondent further relies on the decision of the *ADF* NAFTA Chapter Eleven Tribunal. *ADF*, it argues, presumed that the obligation contained in Article 1102(1) applies only with respect to an investor that has an investment in the territory of another Party, by explicitly explaining that “Article 1102 entitles an investor of another Party and its investment to equal [...] treatment [...] from the time of entry and “establishment” or “acquisition” of the investment in the territory of that Party [...]” (R I, p. 14).
68. Claimants’ allegation that Article 1102(1) would be superfluous if it is not read to protect investors with respect to investments located in their home country, is deemed to be *incorrect* by the Respondent (R II, p. 16; Tr. p. 41). The Respondent strongly opposes this notion, noting that *Article 1102(1) retains independent meaning when its geographic reach is properly limited by Article 1101* in several circumstances (R II, p. 16). As an example, a hypothetical violation of Article 1102(4) is put forward, which would affect the investor and not the investor’s investment. Thus, *the investor’s claim would need to be submitted under Article 1102(1), and could not be submitted under Article 1102(2)* (R II, p. 17). The same purportedly goes for “*pre-establishment*” situations, in which a state measure relating to a putative investor cannot be challenged under Article 1102(2) as *there is not yet any investment that is owed national treatment*. Accordingly, the Respondent’s interpretation *in no way renders Article 1102(1) superfluous* (R II, pp. 17 *et seq.*, Tr. pp. 41 *et seq.*).

69. Additionally, the Respondent draws upon the text of Articles 1102(3) and (4), both of which are only applicable in situations involving an investors of another Party and occurring *in the territory of the Party* and *in its territory* respectively (R I, p. 15; Tr. p. 147). It is asserted that this choice of language shows that the NAFTA Parties only sought to prohibit *domestic legislation designed to restrict or burden foreign investment* with the national treatment obligation, *not domestic legislation that adversely affects investors or investments operating exclusively within the territory of another contracting State* (R I, p. 15; Tr. pp. 40 *et seq.*).
70. Moreover, the Respondent relies on Article 1110 providing protection from for uncompensated expropriations only with respect to measures that relate to investments *in the territory of the expropriating State* (R I, p. 5; Tr. 146 and 223 *et seq.*). Similarly, Article 1105(1) only provides substantive protection in relation to the failure to accord minimum standards of treatment for investments *in the territory of the State that has adopted the challenged measure* (R I, p. 5; Tr. pp. 146 *et seq.*). Lastly, rights under Article 1102(2) are also recognized only with regard to the failure to accord national treatment to investments *in the territory of the State according the treatment*. The Respondent concludes that as Article 1101(1)(b) expressly limits Chapter Eleven’s applicability to measures relating to investments of investors of another party in the territory of the Party, so Article 1101(1)(a) limits its applicability to measures relating to investors with respect to investments in the territory of the State. Article 1101(1)(a) allegedly *cannot be interpreted reasonably any other way* (R I, p. 5; Tr. pp. 135 *et seq.*; Tr. pp. 226 *et seq.*).
71. Furthermore, the Respondent draws the attention of the Tribunal to the fact that if the Claimants’ interpretation were correct, this would mean that any provision in Chapter Eleven that does not contain a territorial restriction could be interpreted *as imposing extraterritorial obligations on the Parties* (R II, p. 19). In the light of Article 1111(1) which, like Article 1102(1), does not include the “in the territory” language, this would enable any NAFTA Party to require that any investor in the Free Trade Area comply with special formalities even if the

investment were located outside its territory, thereby frustrating the objectives of the investment chapter (R II, p. 20; Tr. pp. 52 *et seq.*).

72. In addition, it is the firm position of the Respondent that Claimants' suggestions that the NAFTA Parties have, *sub silentio*, derogated from their habitual treaty practice is *absurd and contrary* to international and U.S. domestic law (R II, p. 6). Allegedly, states express their intention to depart from common and habitual past practice clearly. In the Respondent's view, important principles cannot be assumed to be tacitly dispensed which is said to be confirmed by the award in the *Loewen* arbitration. (R II, p. 7). This is contended to be even more important with regard to *radical and far-reaching* departures from habitual practice that would result from an interpretation (R II, pp. 7 *et seq.*). As there is *no direct expression in the NAFTA of the NAFTA Parties' intent* to discard former *consistent and habitual treaty practice*, the Respondent considers that the treaty is to be interpreted in accordance with the "*common habitual pattern adopted by previous treaties*", which is that private parties lack standing to bring claims against States for money damages (R II, pp. 6 *et seq.*). This is alleged to be even more the case as Claimants' interpretation purportedly would extend the national treatment obligation in a way that *every cross-border trade dispute could trigger the investor-State dispute resolution mechanism* (R II, p. 9; Tr. pp. 23 *et seq.*). The Respondent, hence, draws the conclusion that *[i]t cannot be reasonably argued that the NAFTA Parties created such a mechanism for trader-State arbitration without any record of their consciously doing so* (R II, p. 9; Tr. p. 24).
73. This is said to be further confirmed by U.S. domestic law, according to which a "*treaty cannot impose un contemplated extraterritorial obligations on those who ratify it*" (R II, p. 9). Citing the U.S. Supreme Court in the case of *Sale v. Haitian Centers Council*, the Respondent concludes that a *presumption against extraterritorial application of treaty obligations* applies (R II, p. 9) which cannot be rebutted by *the mere absence of a few words from a few provisions of the NAFTA* (R II, p. 10).

74. Finally, the alleged uniqueness of Claimants' particular claims is regarded by the Respondent to undermine Claimants' interpretation by highlighting just how farfetched it is (R II, p. 2). A multitude of secondary sources by academics and practitioners confirms that the NAFTA did not create or grant any new revolutionary and expansive rights to purported investors (Tr. pp. 142 *et seq.*)
75. Regarding the negotiating history, the Respondent emphasizes that a review of the negotiating history of the NAFTA would confirm the purported meaning of Article 1101(1)(a) (R I, p. 15; Tr. p. 53). In this respect, the Claimants' assertion that the Tribunal may only resort to preparatory texts if the interpretation under VCLT Article 31 leads to a bizarre result is contested by the Respondent, which reads VCLT Article 32 as explicitly allowing *reference to supplementary sources of interpretation in order "to confirm the meaning resulting from the application of article 31"* (R II, p. 32; Tr. p. 289).
76. Observing that NAFTA Chapter Eleven is said to be based on the investment chapter of the predecessor Canada-U.S. Free Trade Agreement and the model U.S. BIT, the Respondent asserts that the coverage of Article 1101(1) (a) is restricted to investors of one Party that have made or are seeking to make investments in the territory of another Party (R I, pp. 15-16). Particularly, the Respondent argues that the Canada-U.S. FTA confines its coverage to "any measure of a Party affecting investment within or into its territory by an investor of the other Party". Likewise, it is alleged that the model US BIT defines "investment" as "every kind of investment, in the territory of one Party owned or controlled directly or indirectly by national or companies of the other Party" and that every BIT or FTA to which the United States is a Party is restricted in a similar manner (R I, p. 16; Tr. p. 54). In this context, the Respondent assures that any derogation from these prior investment agreements would have been *accompanied by significant debate and negotiation* as well as by *subsequent commentary*. As this was not the case, it is contended that this fact confirms Respondent's interpretation (R I, pp. 16 – 17; R II, p. 2; Tr. p. 22), a view which is said to be confirmed by the *Bayview* award (Tr. p. 54).

77. Furthermore, the Respondent relies on preliminary drafts of NAFTA Chapter Eleven dated prior to August 26, 1992, all of which are said to expressly limit the scope of the Chapter to investors of one NAFTA Party that were seeking to make or had made an investment in the territory of another NAFTA Party. Additionally, all drafts of the national treatment provision purportedly contained a similar restriction. It is contended that the first time this language was removed from the respective articles was in the August 26, 1992 “*Lawyers’ Revision*” of *Chapter Eleven* during which a “*legal scrub*” of the Chapter was performed by the respective counsel to the NAFTA Parties (R I, p. 18; Tr. pp. 22 *et seq.*; 315). Its alleged purpose was neither to make *substantive changes* nor to *radically expand an agreement’s scope* but only to *conform language and terminology* and to *eliminate redundancies and obvious conflicts* (R I, p. 18; Tr. pp. 23; 312 *et seq.*). As the language in question was removed without comment in the course of this revision, the Respondent concludes its purpose was not to *fundamentally alter the scope of the investment chapter* but that it was insignificant (R I, pp. 18 *et seq.*; R II, pp. 32 *et seq.*; Tr. pp. 216 *et seq.*). The *preparatory work of the NAFTA thus confirms its ordinary meaning and requires dismissal of Claimants’ claims* (R I, pp. 18 *et seq.*; R II, pp. 32 *et seq.*). Additionally, on August 30, 1992 the “*in the territory*” language was explicitly added back in Article 1102(4)(b) which is said to confirm that Article 1102(1) only applies to investors that have made or seek to make an investment in the territory of the respondent Party (R II, p. 33; Tr. p. 147).

## 2. Arguments by Claimants

78. As regards the interpretation of these Chapter Eleven provisions in the light of the ordinary meaning and the object and purpose of a treaty, the Claimants first assert that the text of the treaty at issue itself is presumed to be the authentic expression of the Parties’ intentions and the starting point of every interpretation, while statements of the Parties with regard to their alleged intent behind a treaty provision are deemed to be irrelevant (C I, ¶ 37). Additionally, the Claimants contend that an interpretation of the ordinary meaning is also to be informed by

the Treaty's context and its general object and purpose. This is said to be confirmed by the Advisory Opinion of the International Court of Justice on *Competences of the General Assembly For The Admission Of A State To The United Nations* (C I, ¶¶ 38 *et seq.*). The Claimants assume that the Respondent *fails to address* this applicable customary international law approach by *manufacturing a generic object and purpose* for NAFTA Chapter Eleven, providing *little more than a cursory reference to VCLT Article 31* (C I, ¶¶ 83 *et seq.*).

79. In this context, the Claimants reject Respondent's purported attempt to *invoke its sovereignty as a defence to the Claim indirectly*, stating that the Claimants are not entitled to receive "the benefit of the doubt" with regard to the Respondent's status as a sovereign (Tr. p. 124). Drawing upon the *Ethyl Tribunal's* award and academic sources, the Claimants contend that this strict rule of interpretation is displaced by VCLT Article 31 (C I, ¶¶ 111 *et seq.*; Tr. p. 125). Further, it is alleged that the terms of NAFTA Articles 1101(1)(a) and 1102(1) *are clear on their face* so that the Claimants need not *seek the benefit of the doubt from the Tribunal* (C I, ¶ 113; Tr. p. 125).
80. Noting that the object and purpose of the NAFTA Treaty are explicitly set out in Article 102(1), the Claimants assert that this article has been repeatedly applied by other NAFTA tribunals when interpreting substantive NAFTA provisions (C I, ¶ 41; Tr. p. 92). According to the Claimants, the relevant NAFTA's objectives in the present case are: Article 102(1)(c), the promotion of "conditions of fair competition in the free trade area"; Article 102(1)(a), the elimination of barriers to trade in goods and services between the territories of the Parties, thereby facilitating their cross-border movement; and Article 102(1)(c), the substantial increase of "investment opportunities in the territories of the Parties" (C I, ¶ 42). With regard to these objectives and to Article 101, the Claimants conclude that the NAFTA *was indeed intended to create a North American Free Trade Area by increasing the flow of goods, services and investment throughout the free trade area* (C I, ¶¶ 43 *et seq.*). References to a Free Trade Area mean that the Parties are *establishing a geographic area within which they agree to regulate themselves based on established norms with the goal of free commerce* (Tr. p. 185). The



Respondent, however, is said to *believe the nature of its case* by briefly mentioning only one of the objectives contained within Article 102(1) (C I, ¶ 84). After failing to persuade the tribunal in the *Softwood Lumber* case that Article 102(1) was only intended to apply to interpretations of the NAFTA Parties themselves, the Respondent is said now to try to ignore the ordinary meaning of the objectives found in Article 102(1) and to suggest an alternative, not based upon the NAFTA text (C I, ¶¶ 85 *et seq.*).

81. Claimants' findings mentioned above are said to be further confirmed by the language of the NAFTA preamble (C I, ¶ 45; Tr. p. 91). Relying upon VCLT Article 31(2) and upon the awards in the *S.D. Meyers* and the *Cross-Border Trucking* arbitrations, the Claimants assure that the text of the preamble has to be included in the interpretation of the NAFTA's objectives found in Article 102(1) (C I, ¶¶ 45 *et seq.*). The Respondent, however, is criticized for *making no reference to representations [...] in the NAFTA preamble* at all (C I, ¶¶ 88, 91 *et seq.*).
  
82. According to the Claimants, the promises in the preamble to "REDUCE distortions to trade" and to "ESTABLISH clear and mutually advantageous rules governing their trade" establish the rule of law in the new FTA. The preambular resolution to "CREATE an expanded and secure market for the goods and services produced in their territories" is said to inform the significance of the Parties' establishment of an FTA in Article 101 (C I, ¶ 47). This purpose of an expanded and secure North American market is allegedly repeated in two further preambular resolutions, which are claimed to *focus on individual economic actors, providing them with the promise of stability and security for their commercial activities undertaken anywhere in the North American Free Trade Area*; namely: to "ENSURE a predictable commercial framework for business planning and investment" and to "ENHANCE the competitiveness of [North American] firms in global markets" (C I, ¶ 48). Allegedly, these resolutions are intended to *reinforce the legitimate expectations* created by NAFTA Articles 1102(1) and 1116(1), which promise national treatment for "investors of another party" and the right to seek compensation in case of non-adherence (C I, ¶ 49).

The Claimants conclude that the risen *expectation shared by all investors is that another NAFTA Party will not impose measures that accord more favourable treatment to their own investors* in the North American Free Trade Area (C I, ¶ 49). This leads to Claimants' conclusion that the NAFTA is unique due to its *rule-of-law based instrument that would encourage private actors to join in a process of achieving deep economic integration* (C II, ¶¶ 104 *et seq.*; Tr. pp. 137, 140). This intention to promote a deep level of economic integration is said to be confirmed by statements of academic writers (C II, ¶ 105; Tr. pp. 141 *et seq.*).

83. For this reason, the Claimants strongly reject Respondent's *generic object and purpose* approach, which is said to be derived not from NAFTA itself but from other BITs, thereby portraying NAFTA *as being only a pedestrian trade treaty* with a separate BIT attached (C I, ¶ 89). By doing so, Claimants accuse the Respondent of *pick[ing] and choos[ing] amongst the NAFTA's objectives* (C II, ¶ 87). The Claimants oppose this "*all or nothing*" approach to interpretation, affirming that the NAFTA's investment obligations both offer usual BIT protection to investments and greater protection to investors (C I, ¶¶ 90 *et seq.*; Tr. pp. 94, 136). By not acknowledging this, the Respondent is said to be ignoring the *differences that exist between the NAFTA and [...] other treaties* (C I, ¶ 96; Tr. p. 137). In any case, the Claimants contend that Respondent's submission on *[w]hether the Claimants would qualify as an "investor" or "foreign investor" under a BIT is not relevant in determining whether they qualify under the NAFTA definition of an "investor of another Party"* (C II, ¶ 76). Citing the *Methanex* case, the Claimants assure that while principles can sometimes be drawn from different treaty texts, such an exercise should not divert the interpreter from the general rule of interpretation (C I, ¶¶ 97 *et seq.*).

84. Additionally, the Claimants argue that the Respondent wrongly fails to acknowledge that the terms to which it has agreed in other treaties are not relevant to interpretation of the treaty terms at hand (C I, ¶ 99). The jurisdictional basis for the Claimants' claims in the case at issue is, Claimants reiterate, not founded upon other United States BITs but in the NAFTA itself. Differently framed BITs purportedly simply show how the United States could have

restricted the scope of the NAFTA's national treatment obligation, but failed to do so (C II, ¶¶ 100 *et seq.*). Furthermore, none of the other U.S. BITs includes the explicit NAFTA objective "to promote conditions of fair competition in the free trade area" nor the objective to "substantially increas[e] investment opportunities in the territories of the parties" (C II, ¶ 103).

85. Moreover, Respondent's reliance on the ICSID case *Gruslin v. Malaysia* is regarded by the Claimants as irrelevant, since the jurisdictional criteria pursuant to Article 25 of the ICSID Convention are said to differ considerably from the those established under NAFTA Chapter Eleven. According to Claimants, the Respondent *mischaracterizes both claimant's position in the case, and the facts and arguments* (C I, ¶ 108; C II, ¶¶ 97 *et seq.*; Tr. pp. 144, 325). Whereas *Gruslin* dealt with an indirect investment in the territory of another Party, the Claimants in the present case argue that they have been denied national treatment for investors operating in like circumstances in the Free Trade Area established particularly under the NAFTA (C I, ¶¶ 109 *et seq.*; Tr. pp. 112 *et seq.*). Accordingly, the *Gruslin* award is deemed to *not assist the Tribunal with respect to the present case* (C I, ¶ 110).
86. With respect to the Respondent's claim that an SPS measure would fall under NAFTA Chapter Seven and, thus, cannot be challenged under NAFTA Chapter Eleven, the Claimants note that there is nothing in NAFTA Chapter Seven *that prevents the Claimants from seeking damages in relation to the damages suffered as a result of the Respondent's imposition of the measures at issue* (C II, ¶¶ 89 *et seq.*; Tr. pp. 159 *et seq.*). Accordingly, SPS measures are said not to be implicitly excluded from the ambit of Article 1102(1)(C II, ¶¶ 90 *et seq.*).
87. All in all, the Claimants conclude that *cardinal element* in the object and purpose of the NAFTA is the establishment of *a geographically contiguous free trade area within which the rule of law governed by a principle of nondiscrimination is intended to reign* (Tr. p. 92).

88. Regarding the context (Articles 31(1) and (2) VCLT), considering that the surrounding text of NAFTA Chapter Eleven provides context for the construction of Article 1102(1), the Claimants urge the Tribunal to adopt an interpretation that gives harmonious meaning to all of the terms in accordance with *the principle of effectiveness in treaty interpretation* (C I, ¶¶ 50 *et seq.*).
89. First, the Claimants embark upon Article 1139, containing the definitions of “investor of a Party” as well as of “investment”. According to them, both definitions are fulfilled, considering that *[t]he claimants are all nationals of Canada who have established enterprises and employed real estate and other property for the purpose of establishing, and participating in, an integrated North American market for live cattle* (C I, ¶ 52).
90. Second, the Claimants contemplate that Article 1116 provides a remedy for “an investor of a Party” if “another Party” has breached a provision such as Article 1102(1) and the investor incurred a loss or damage by reason or resulting from the breach (Tr. pp. 94 *et seq.*). Inasmuch as all claims in the current arbitration have been made in respect of losses arising out of the alleged discriminatory intervention by the United States in breach of Article 1102(1), and considering that the Claimants comply with the definition of “investor of a Party” in Article 1139, Claimants conclude that the conditions of this *fundamental provision* are fulfilled (C I, ¶¶ 53 *et seq.*). A territoriality requirement is *nowhere in that text* (Tr. p. 95).
91. As regards Article 1101(1)(a) and (b), the Claimants submit that it *unambiguously* applies both to measures relating to “investors of another Party” and “investments of investors of another Party in the territory of the Party” (C I, ¶ 55; Tr. pp. 95 *et seq.*). Accordingly, the Claimants deny Respondent’s allegation that the scope of Article 1101 only extends to “investors of another Party” that have made investments in the territory of another Party (C I, ¶ 55). The Claimants further state that Article 1101 distinguishes between obligations to protect investments, *much like a simple bilateral investment treaty*, and the obligation to protect investors, consistent with the establishment of a Free Trade

Area pursuant to Article 101 (C I, ¶ 56). Whereas subparagraph (b) allegedly works in conjunction with Article 1116 and other substantive provisions to provide the protection normally found in a BIT, subparagraph (a) is said to work in conjunction with Articles 1102(1), 1103(1) and 1116 to provide *greater protection* to investors against non-discrimination than normally found in a BIT. This is reinforced by the fact that none of the Respondent's BITs *ever purported to establish the world's largest free trade area* as the NAFTA does (C I, ¶ 57; Tr. p. 135).

92. More precisely, the Claimants ascertain that the traditional protections of a BIT are all contained in NAFTA Chapter Eleven (C I, ¶ 58). Particularly, it is conceded that Articles 1106, 1107 and 1110 explicitly impose a territoriality requirement on covered investments (Tr. p. 97). Similarly, Article 1105, read in conjunction with Article 1101(1)(b), requires that an investment be made in the territory of another NAFTA Party in order to extend its protection (C I, ¶ 59 *et seq.*; Tr. p. 98). The same allegedly goes for Article 1102(2) and Article 1103(2) (Tr. pp. 99 *et seq.*).
93. In contrast to these articles, however, the Claimants submit that Articles 1102 and 1103 *constitute hybrid provisions* when read in context with Article 1101(1) and in light of the NAFTA's objectives. They allegedly go further than merely providing the traditional BIT protection for cross-border investments, protecting the rights and interests of NAFTA investors directly wherever the investment has been made in the Free Trade Area and providing them with a right to national treatment (Tr. pp. 100 *et seq.*). It is asserted that this *protection is based upon a comparison of investors whose circumstances of competition are "like"* in that they participate in an integrated continental market (C I, ¶ 62; Tr. p. 101). Accordingly, *not everybody who trades in goods across the Parties' borders should be entitled to make a claim for money damages but only those who invested in building an integrated regional market within the Free Trade Area and who can prove that they are in like circumstances with other participants in that same integrated market* (Tr. pp. 104 and 261 *et seq.*).

94. The Claimants argue that these circumstances are -dependent on context, relying on the award of the *Pope & Talbot* Tribunal, and further assert that the circumstances of the present case are *sui generis*. (C I, ¶¶ 63, 104). They allege that before May 23, 2003, the Claimants competed with U.S. and other Canadian-based competitors in like circumstances in a continental market, established by the economic integration within the North American Free Trade Area (Tr. pp. 70 *et seq.*, 102 *et seq.*). This is said to be confirmed by statistical information (Tr. p. 72 *et seq.*). It is contended that this situation was changed by the Respondent's measures *radically altering the circumstances in which North American cattlemen operated* (C I, ¶ 64). The Respondent, however, is said to ignore this *sui generis* character of the case by recasting the issue *as being common and well-settled* (C I, ¶ 104). Quite to the contrary, the present case is said to be *the first of its kind*, where *deep regional integration* was achieved in a particular industry (Tr. p. 104).
95. Summarizing, the Claimants confirm that, according to Article 102(1), the NAFTA was designed to promote conditions of fair competition in the Free Trade Area based upon the principle of non-discrimination and national treatment (C I, ¶ 65; Tr. pp. 166 *et seq.*). They reiterate that Articles 1102(1) and 1103(1) distinguish between the protection of investors and the protection of investments. With regard to the protection of investments, the Claimants contend that although neither paragraph indicates a territoriality requirement, Article 1101(1)(b) imposes it on the provisions (C I, ¶ 66). In contrast, Articles 1101(1)(a), 1102(1) and 1103(1) do not contain any such territoriality link, indicating that they are intended for *the protection of investors, as investors* (C I, ¶ 67). For this reason, the Claimants also reject Respondent's interpretation of the treaty terms as *[p]aragraph (1) of Article 1102 must have a meaning independent of paragraph (2)*. Otherwise, *there would be no need for paragraph (1) and both paragraph (1) and Article 1101(1) (a) [would be rendered] inutile* (C I, ¶¶ 68 *et seq.*). Even in cases of "pre-establishment," there would allegedly be no need for Article 1102(1) to be invoked by an investor under this interpretation because the breadth of protection already provided under Article 1102(2) (C II, ¶¶ 79 *et seq.*).

96. The Claimants further contend that the Respondent fails to acknowledge that if they had intended to restrict an obligation to measures affecting investments in the territory of another NAFTA Party, the drafters would have done so clearly. Whereas Article 102(1)(c) explicitly refers to investments in the “territories of the Parties” *globally*, this is contrasted with subparagraph (d) which protects intellectual property rights “in each Parties’ territory” and, thus, *in the territories of the Parties respectively* (C I, ¶ 93; C II, ¶¶ 93 *et seq.*).
97. Moreover, the Respondent is criticized by Claimants for putting forward unrelated NAFTA cases such as *ADF* and unrelated academic articles, ignoring the claims’ *sui generis* character (C I, ¶¶ 106 *et seq.*; Tr. p. 143). Further, Claimants highlight that in any case pursuant to NAFTA Article 1136(1) “an award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case” (C I, ¶¶ 106 *et seq.*).
98. Additionally, Respondent’s claim of a “habitual practice” rule is heavily contested by the Claimants, affirming that *there is no general rule of treaty interpretation whereby the plain meaning of treaty terms can or should be ignored in favour of the so-called “habitual practice”* of the Parties (C II, ¶ 30; Tr. pp. 126 *et seq.*). The jurisprudence and academic literature which are cited by the Respondent in support of its position are alleged to be inapplicable to the present case (C II, ¶¶ 36 *et seq.*; Tr. p. 127). Moreover, in Claimants’ view the Respondent fails to *explain why a “habitual pattern” found in the negotiations of BITs should apply to the NAFTA which is deemed to be unique* (C II, ¶ 39). Furthermore, since the governing law of this arbitration is international law, the Respondent’s remarks on its national law are deemed to be *not useful* by the Respondent (C II, ¶ 45).
99. Lastly, with respect to the Respondent’s claim that a SPS measure would fall under NAFTA Chapter Seven and, thus, cannot be challenged under NAFTA Chapter Eleven, the Claimants note that there is nothing in NAFTA Chapter Seven *that prevents the Claimants from seeking damages in relation to the damages suffered as a result of the Respondent’s imposition of the measures at*

*issue* (C II, ¶¶ 89 *et seq.*; Tr. pp. 159 *et seq.*). Accordingly, SPS measures are said not to be implicitly excluded from the ambit of Article 1102(1) (C II, ¶¶ 90 *et seq.*).

100. Regarding the negotiating history, the Claimants submit that the recourse to preparatory texts of a treaty as well as to contemporaneous statements and actions of the Parties form an *ancillary approach* to treaty interpretation outlined in VCLT Article 32, which should only be applied if the ordinary meaning of the treaty terms in context and in light of its objectives lead to an *absurd result* (Tr. p. 106). The latter is defined as *bizarre or incongruous in context* (C I, ¶ 70). Since neither result of the Parties' interpretation is absurd, it is suggested that the ancillary approach need not be applied by the Tribunal (C I, ¶ 71; Tr. pp. 106 *et seq.*).
101. Furthermore, the Claimants object to Respondent's approach since the NAFTA Parties did not issue any official *travaux préparatoires* (Tr. p. 106). Only in July 2004 did the NAFTA Parties jointly release what the Claimants call *informal travaux*. Although the Claimants contend that tribunals have been cautious to read too much into these preparatory texts, an approach they assert was confirmed by the award in the *Methanex* arbitration (C I ¶ 72), Claimants recognize that the *draft negotiating texts could serve the limited function of confirming the meaning of treaty terms derived from application of the general approach to interpretation*, which is said to be confirmed by the decision in the *Noble Ventures* arbitration (C I, ¶ 73; C II, ¶ 117).
102. Subsequently, the Claimants embark upon the drafting history of what would later become NAFTA Article 1101. They contend that the earliest versions of Article 1101 qualified the application of NAFTA Chapter Eleven to individual economic actors who had made an investment in the territory of another Party without distinguishing between the *investor/investment architecture that demarcates the final version* (C I, ¶ 74; Tr. p. 108). The Claimants go on to point out that by May 22, 1992, the draft provision was broken into a paragraph on investor protection and a paragraph on investment protection (C I, ¶ 75; Tr. p.



- 108). On August 26, 1992, the territoriality requirement was removed, leaving nothing more than “investors of another NAFTA Party” in paragraph (b). According to the Claimants, this demonstrates how investors were intended by the drafters to receive protection *in their own right as investors*, intending a territorial qualification only for investments (C I, ¶ 76; Tr. p. 109).
103. As regards the negotiating history of Article 1102, the Claimants consider the change to the draft on August 26, 1992 by which the territorial requirement for investors was removed to be of major importance (C I, ¶ 79; Tr. p. 109). Since this part of the provision remained untouched during the following 20 versions of the negotiating draft, the Claimants conclude that the change was neither *insignificant* nor *accidental* but that it was *deliberate* (C I, ¶ 80 *et seq.*; Tr. p. 111). All in all, the Claimants submit that the significance of these changes confirm the ordinary meaning of the terms in their context and in light of the objectives of the NAFTA as contended by the Claimants (C I, ¶ 82; Tr. p. 111).
104. In addition, the Claimants strongly oppose the Respondent’s *attempts to downplay the obvious significance of the changes* made to the treaty text by *manufacturing a “legal scrub” exception*. They ascertain that there is *no basis in international law* for Respondent’s proposition that changes are not significant just because they were made by lawyers shortly before the finalization of the text (Tr. p. 107). This is particularly so given the case given that these changes were, they assert, made by persons who were *likely some of the best lawyers in the Parties’ employ* (C I, ¶ 115) and that *there were no less than 20 more opportunities to make changes to the text over a period from 31 August, 1992 to 23 April 1993* (C II, ¶ 118; Tr. pp. 107 *et seq.*).
105. Lastly, the Respondent’s recourse to the predecessor 1989 Canada-U.S. Free Trade Agreement and to other BITs is deemed by the Claimants to be irrelevant. In their view, the NAFTA is an advanced successor agreement, a position which is said to be confirmed by the *Softwood Lumber* tribunal. It has its own “scope and coverage” provision and provides more protection than a mere BIT (C I, ¶¶ 100 *et seq.*).

### 3. Submission by the United Mexican States

106. In its Article 1128 submission, the United Mexican States (Mexico) adds that the interpretation of the NAFTA and particularly of NAFTA Chapter Eleven in accordance with customary rules of international law must be governed by the fact that Chapter Eleven is part of a broader Free Trade Agreement, providing for the liberalization of trade in goods and services by producers situated in the territories of the contracting States (M, ¶ 5).
107. Regarding the context (Articles 31(1) and (2)), first, Mexico agrees with the United States that the NAFTA Parties did not undertake any obligation with respect to investments located outside of its territory or regarding investors that are not seeking to make, are not making and have not made investments in its territory (M, ¶ 2).
108. As regards trade in goods, Mexico stipulates that NAFTA Chapter Three provides for national treatment and market access. Mexico argues that violations of these provisions may only be contested by State-to-State dispute settlement (M, ¶ 6). Whereas the latter is said to form the general rule for NAFTA dispute settlement, the investor-State arbitration for an alleged breach of a substantial provision contained in Section A of Chapter Eleven allegedly is one of two exceptions that provide a private party with direct access to international jurisdiction *in respect of a circumscribed subject-matter*. (M, ¶ 7). Accordingly, Mexico emphasizes that Chapter Eleven tribunals do not have the competence to address violations of other NAFTA chapters, and that a private party has no access to international arbitration to complain of a breach that is not specifically made actionable by Articles 1116 and 1117 (M, ¶ 8). While the purpose of the respective NAFTA chapters is *to reduce barriers to trade so that producers situated in one NAFTA Party enjoy better access to other markets, the NAFTA did not go so far as to establish a full customs union or common market with no remaining restrictions on trade between the Parties* (M, ¶¶ 9 *et seq.*).

109. Mexico regards Chapter Eleven as providing for the liberalization of investment flows, enabling commercial actors to produce goods or services in the territory of another Party by means of an investment (M, ¶ 11). Article 1101 establishes the Chapter's scope, indicating that it applies to measures with regard to "investors of another Party" and "investments of another Party in the territory of the Party" (M, ¶ 12). "Investor of a Party" is defined in Article 1139 as a person that seeks to make, is making, or has made an "investment". Chapter Eleven applies to measure relating only to an "investment" of an investor of a Party in the territory of another contracting Party. From the fact that the term "investment" is used to define "investor", Mexico concludes that the obligations of States Parties under NAFTA Chapter Eleven are owed only to an "investor" that seeks to make, is making, or has made an investment within the territory of another NAFTA Party (M, ¶¶ 13 *et seq.*). This result would also follow from the drafting conventions of the NAFTA, the Treaty's territorial basis, the fact that it establishes a free trade area and not a more extensive form of economic integration, and the plain meaning of Chapter Eleven's terms with regard to the applicable rules of treaty interpretation. To read Article 1101(1)(a) otherwise *would lead to an outcome which was plainly not intended by the NAFTA Parties* (M, ¶ 16).

#### **4. The Tribunal**

##### **4.1. Introduction and Summary**

110. The disputing Parties have submitted detailed and searching analyses of the relevant provisions of the NAFTA and related instruments. Their submissions have been helpful to the Tribunal, which has found the provisions of NAFTA Chapter Eleven to be less clear and consistent than one might hope for in a treaty so long negotiated and so closely scrutinized and debated.

111. Although Claimants' position is far from frivolous, the Tribunal has concluded that their interpretation of Chapter Eleven, which would require the isolation of NAFTA/UNCITRAL Canadian Cattle Claims Award on Jurisdiction

the investor from his investment, would do more violence to the fabric of Chapter Eleven, and to the overall fabric of the NAFTA, than the interpretation espoused by Respondent. In this Tribunal's view, a careful review of the key provisions of Chapter Eleven in their full context, as the VCLT requires, demonstrates that the only investors who may avail themselves of the protections of Chapter Eleven, including its national treatment protections, are actual or prospective foreign investors in another NAFTA Party. Because Claimants concede they are only domestic investors, their claim must fail.

112. As the Tribunal will discuss in further detail in the following paragraphs, "investors" do not exist in Chapter Eleven in isolation, but are explicitly linked to their investments. And because it is clear from the text that the only "investments" covered by Chapter Eleven are those that are made (or planned to be made) in the territory of another NAFTA Party by qualifying persons of one NAFTA Party – *i.e.*, foreign investments – and because it is therefore clear as well that purely domestic investments do not fall within the scope of Chapter Eleven of the NAFTA, we find it illogical and inconsistent with the structure of Chapter Eleven as a whole that the scope of its protection for investors should be different.
113. The issue does not turn simply on the presence or absence of specific territorial language in particular sections. Other provisions of Chapter Eleven, including those distinguishing between trade and investment rights, provide important contextual insight. The larger NAFTA, including but not limited to its preamble and object and purpose clause, also forms part of the relevant context.
114. Had Chapter Eleven been intended to provide national treatment protection to domestic investors selling across borders in integrated markets in the NAFTA free trade area, as Claimants argue, this Tribunal would have expected numerous provisions of Chapter Eleven to be drafted quite differently, as well as to find some express indication of such a significant and unprecedented expansion of the scope of investment protection somewhere in the course of the NAFTA negotiations, or its approval by the NAFTA Parties. But there is none. There is

none at all. Although NAFTA is arguably unique, and although Chapter Eleven is a much more complex instrument than a simple bilateral investment treaty, fundamentally Chapter Eleven functions to encourage and protect foreign investment, leaving other parts of the NAFTA to provide redress for measures that do not implicate foreign investors or their investments.

#### **4.2. Governing Law**

115. It is common cause between the Parties that the governing law of this dispute is established by Article 1131 of the NAFTA, which requires a decision in accordance with the NAFTA and applicable rules of international law.

116. It is also common cause that the VCLT provides the applicable rules of international law governing the interpretation of the NAFTA. As noted previously, Article 31(1) of the VCLT requires that a the terms of treaty be interpreted in good faith, in accordance with their ordinary meaning, taken in context and in light of the treaty's object and purpose. Article 31(2) goes on to define a treaty's context as including not only its text (including preamble and annexes) but also any contemporaneous agreement between the parties or any contemporaneous instrument of one of the parties accepted by the others.<sup>1</sup>

#### **4.3. Analysis: Ordinary Meaning as Discerned from the Text**

117. This Tribunal seeks to determine ordinary meaning by turning first to the text of key provisions of Chapter Eleven.

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<sup>1</sup> It is also common cause between the disputing parties that Article 31 establishes no hierarchy or priorities as to the relevance of the particular sources of meaning referred to therein. Subsequent agreement and/or practice, which are also relevant sources as provided in Article 31(3), are discussed in the next section.

**a. Article 1101**

118. This Tribunal’s textual analysis begins with Article 1101 – not only the first article of Chapter Eleven, but a key article in terms of the entire Chapter’s scope and coverage. Recognizing its critical role, the *Methanex* Tribunal characterized Article 1101 as the “gateway” to Chapter Eleven in these terms: “*This [Article 1101] is the gateway leading to the dispute resolution provisions of Chapter Eleven. Hence the powers of the Tribunal can only come into legal existence if the requirements of Article 1101(1) are met.*” [*Methanex Corporation v. the United States of America* (First Partial Award), 7 August 2002, ¶ 106.]<sup>2</sup>
119. Article 1101 provides for the application of Chapter Eleven to measures adopted or maintained by a NAFTA Party that relate to three classes: (1) investors of another Party; (2) investments of investors of another party in the territory of the Party whose measure is at issue; and (3) with respect to claims involving measures challenged under Article 1106: Performance Requirements, or Article 1114: Environmental Measures, all investments (*i.e.*, not just from other NAFTA Parties) in the territory of the Party whose measure is at issue.
120. There is no dispute between the Parties that the U.S. government actions at issue here involved “measures” that have been adopted and maintained by a NAFTA Party. Nor is there any dispute at present about whether the measures at issue satisfy the “relates to” requirement.<sup>3</sup> Rather, the dispute in answering the preliminary question before the Tribunal centers around the proper interpretation of the term “investors of another Party,” as used in Articles 1101(a) and 1102(1), and whether the term encompasses persons who have not made, are not seeking

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<sup>2</sup> The Tribunal in *Bayview* similarly stated: “*The role of Article 1101 in determining the scope of the jurisdiction of tribunals established to hear Chapter Eleven claims is clear from the title of the Article. It defines the ‘scope and coverage’ of the entirety of Chapter 11 ....*” *Bayview Irrigation District v. United Mexican States* (ICSID Case No. ARB(AF)/05/1), Award, June 19, 2007, ¶ 85.

<sup>3</sup> The disputing Parties in this case have agreed that the issue of whether the “relating to” requirement of Article 1101 is satisfied is left for another day, and only to be reached if the answer to the preliminary issue is affirmative. [*see, e.g.*, Tr. at 284-85].

to make, and are not making, investments in the territory of another NAFTA Party.

121. Of these three classes of measures covered by Article 1101, the two focusing on “investments” contain express territorial limitations, requiring that the investments be “in the territory of the Party” adopting or maintaining the measure. Although the third, focusing on “investors,” was drafted without the inclusion of any explicit territorial language, this Tribunal is of the view that the meaning of the “investor” class cannot be determined in a vacuum; indeed to do so would run counter to the dictates of Article 31 of the VCLT. Article 1101 uses defined terms, and our inquiry takes us to those terms next.
122. Article 1139, the definitions section of Chapter Eleven, does not define “investor” or “investor of another Party.” However, it does define “investor of a Party,” of which “investor of another Party” would seem to be a simple variant. “Investor of a Party” is defined as a “Party [NAFTA country], or state enterprise thereof, or a national or an enterprise of such Party, *that seeks to make, is making or has made an investment*” (emphasis added). “Investors of another Party,” as used in subparagraph (a) of Article 1101, must be investors of a different Party from the Party enacting the measure at issue, referred to in the lead-in to that Article.
123. The foregoing definition leaves no doubt that “investors” only exist based on “investments.” This is further reinforced by the parallel definition of “investor of a non-Party” in Article 1139. As with the definition of “investor of a Party,” this definition focuses on a person “*that seeks to make, is making or has made an investment*” (emphasis added). In other words, both Article 1139 definitions of “investors” make it plain that “investors,” whether of a Party or a non-Party, cannot exist without “investments.”
124. Although these definitions of “investors” thus establish a necessary linkage between investors and investments, they do not answer definitively the question of where those investments must be located.

125. Nor is the definition of “investment” in Article 1139 dispositive on that question, in this Tribunal’s view (although, as discussed below, certain of its provisions contain highly probative language). It would be premature, however, to conclude based on the provisions examined thus far that there is no territorial limitation for investors in Chapter Eleven.
126. Returning to Article 1101(1) in light of these definitions provides the first crystallization of the answer. From the fact that Article 1101(b) and (c), which are conjunctively linked with 1101(a), explicitly limit Chapter Eleven’s coverage to investments *in the territory* of the Party whose measure is at issue, it is apparent that the foreign investment, and the investors who engage in such investment activities, are the concern of Chapter Eleven. In other words, “investors” are inextricably linked to “investments,” which Article 1101 limits to “foreign investments,”– that is to say, investments of a party in the territory of another Party whose measure is at issue.<sup>4</sup>
127. Thus, the “gateway” to Chapter Eleven – Article 1101 – is properly read, in this Tribunal’s view, to render Chapter Eleven applicable only to investors of one NAFTA Party who seek to make, are making, or have made, an investment in another NAFTA Party. Absent those conditions, both the substantive protections of Section A, and the remedies provided by Section B, of Chapter Eleven, are unavailable to an investor.
128. Although this analysis should be sufficient to dispose of the issue at hand, subsequent sections will review other relevant provisions of Chapter Eleven and the NAFTA so as to provide the fullest possible context for this Tribunal’s conclusions.

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<sup>4</sup> The Tribunal agrees with Respondent that Chapter Eleven’s failure to use the term “foreign investment” or “foreign investor” should not be given any weight as the NAFTA is a multilateral rather than a bilateral treaty. [R II, p. 15.]



**b. Article 1102**

129. An examination of the provisions of Article 1102, the national treatment norm claimed to have been violated in these cases, provides no basis for change in the above analysis. The article begins with parallel protections for “investors of another Party” and their “investments” in Articles 1102(1) and 1102(2), respectively. [For text, see section F.I. *supra*.] The investor protections of Article 1102(1) establish obligations of the state enacting the measures not with respect to investors in isolation, but in connection with the treatment of their similarly situated “investments.”<sup>5</sup> Article 1102, rather than eliminating it, thus maintains and reinforces the necessary linkage of investors to investments found in our analysis of Article 1101.
130. Claimants have made much of the fact that there is no territorial language in Article 1102(1). This proves too much, as neither Article 1101(1) (focusing on investors) nor 1101(2) (focusing on investments) contains such language. Its absence does not signify, in this Tribunal’s view, that no territorial limitation for either is required, but, instead, simply reinforces the conclusion that it is the “gateway,” Article 1101, that supplies that reference point for both subparagraphs. To read Article 1102(1) as Claimants would have this Tribunal do, as conferring national treatment rights on investors without foreign investments because of the absence of territorial language in that subparagraph, would ignore this structure and context. The fact that the only mention of territoriality in Article 1102 is in Article 1102(4), a provision applicable to “investors,” whose stated purpose is to “provide greater certainty,” is further reinforcement of this view.
131. Other Chapter Eleven Tribunals have read territorial language into Article 1102(1). The *ADF* Tribunal interpreted Article 1102 as “*entitl[ing] an investor of another Party and its investment to equal (in the sense of ‘no less favorable’)*”

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<sup>5</sup> The specific protected activities are the establishment, acquisition, expansion, management, conduct, operation, and sale and other disposition of “investments.”

*treatment, in like circumstances, with a Party's domestic investors and their investments, from the time of entry and 'establishment' or acquisition' of the investment in the territory of that Party, through the 'management,' 'conduct,' and 'operation' and 'expansion' of that investment, and up to the final 'sale or other disposition' of the same investment."* [ADF Group, Inc. v. United States, ICSID Case No. ARB(AF)/00/1, Award, ¶ 153 (Jan. 9, 2003).]

132. Moreover, as Respondent has pointed out, the investor provisions have independent meaning. For example, providing certain substantive protections for "investors" as distinct from "investments" is important in the pre-establishment phase of an investment, as well as in the circumstances highlighted by Article 1102(4). [See R II, pp. 16-18.]
  
133. Conversely, were the NAFTA to providing national treatment protection to "investors" having only domestic investments, without providing such treatment to the investments themselves (a result required by the explicit territorial requirements of Article 1101(2)), an asymmetry in the scope of the NAFTA would result. Such a dichotomy would not only be illogical, as Respondent has argued [see R I, pp. 12-13], but would also be difficult to reconcile with other provisions of Chapter Eleven, as discussed earlier and below.

**c. Articles 1103 and 1116**

134. Claimants have highlighted two other provisions of Chapter Eleven – Articles 1103 and 1116 – to support their interpretation of Articles 1101 and 1102.
  
135. Article 1103, Chapter Eleven's most-favored-nation clause, is, in structure and substance, identical (except for the comparator class) to Article 1102. An analysis of its provisions yields results no different from the analysis of Articles 1101 and 1102 above regarding the territorial scope of Chapter Eleven.
  
136. Nor do the so-called claiming provisions of Article 1116, (under which the instant claims are brought,) support a different finding as to the meaning of

Article 1101. Article 1116, the basis for Claimants' claims, permits claims to be made by an investor of a Party on its on behalf. Its counterpart, Article 1117, permits claims by an investor of a Party on behalf of an enterprise of another Party that it owns or controls. Claimants' attempt to present Article 1116 as the procedural complement to the investor-focused rights in Article 1102(1) makes little sense both as a textual matter and also when the claiming provisions are considered comparatively and in context.

137. First, both Article 1116 and Article 1117 focus on investors; they do not reflect a parallel investor/investment structure. (In fact, Article 1117 not only focuses on investors rather than investments, but specifically prohibits claims by investments.) Both rely on the Article 1139 definition of "investor." As discussed *supra*, this definition makes it clear that investors do not exist in isolation from their investments. Moreover, Article 1101, by its terms, applies to the entirety of Chapter Eleven, including the procedural provisions of Section B of which the claiming provisions of Article 1116 are part. Article 1101 unambiguously refers to "this Chapter," which comprises both Section A, the substantive investment protections, and Section B, the investment dispute resolution mechanism. Neither Article 1116 nor Article 1117 contains territorial language. And the express language of Article 1117 regarding the enterprises on whose behalf an Article 1117 claim may be submitted also evidences a focus on foreign investors by its reference to enterprises of *another* Party. Considering Article 1116 in this context, the Tribunal sees no basis for concluding it is intended to establish a claim mechanism for domestic investors.

**d. Other Provisions of Chapter Eleven – Further Context**

138. Other provisions of Chapter Eleven support the conclusion reached above that the only investors protected by Chapter Eleven are those that have made, are making, or seek to make investments in another NAFTA Party, not those who have only made domestic investments and therefore merely suffer losses in the context of trade in goods or services.

139. This subsection examines three areas: first, provisions in Chapter Eleven which focus primarily not on territoriality *per se*, but on the types of activities covered by Chapter Eleven, particularly those that elucidate the extent to which Chapter Eleven's applies to cross-border trade in goods and services; second; other provisions of Chapter Eleven that overlay or interact, explicitly or implicitly, with Article 1102 or investment activities protected by Article 1102, thereby shedding light on the scope of investor protections under Article 1102; and third, the extent to which territorial references in other substantive protections of Section A of Chapter Eleven, and the negotiating history of Chapter Eleven, offer probative evidence on the proper interpretation of Articles 1101 and 1102(1).

**(i) Exclusion of Cross-Border Trade Activities From Chapter Eleven**

140. Several provisions of Chapter Eleven confirm that only investors with foreign investment, and not domestic investors such as Claimants engaging in cross-border trade, fall within the scope of Chapter Eleven.

141. Article 1139's definition of "investment" is perhaps the most important illustration of this point, as its definitions apply across all provisions of Chapter Eleven. Subparagraphs (a) through (g) of this definition enumerate a range of interests that can qualify as investments, from different territorial types of securities to other economic interests and assets, and do not explicitly address issues of territorial location.<sup>6</sup>

142. However, the last two subparagraphs of the "investment" definition, in the context of addressing contractual interests, demonstrate that NAFTA Chapter Eleven was not intended to cover simple cross-border trading interests.

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<sup>6</sup> Claimants' submissions have focused primarily on subparagraph (g) of Article 1139, which covers "*real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes.*"

Subparagraph (h), in discussing turnkey, construction, and other types of contractual interests, requires a commitment of capital or other resources “*in the territory of a Party to economic activity in such territory*” for such interests to be considered an “investment” (emphasis added).

143. Subparagraphs (i), and (j) of the definition of “investment,” exclusionary clauses also focus on contractual claims, and are even more telling. Subparagraph (i) provides that mere money claims arising out of cross-border goods in trade or services or trade financing, unaccompanied by any of the other interests previously enumerated in the definition, do not constitute an investment.<sup>7</sup> Subparagraph (j) excludes “*any other claims to money.*”
144. In other words, these exclusions establish that mere cross-border trade interests are not sufficient to trigger Chapter Eleven – something more permanent – such as a commitment of capital or other resources in the territory of a Party to economic activity in such territory – is necessary for a contractual claim for money based on cross-border trade to rise to the level of an investment. Moreover, the exclusion’s requirement that these simple trade interests be coupled with one of the other types of investment interests enumerated in subparagraphs (a) through (h) to fall within the definition of “investment”<sup>8</sup> make

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<sup>7</sup> The specific text of this exclusion is as follows:

*“but investment does not mean,*

(i) *claims to money that arise solely from*

(i) *commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or*

(ii) *the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d) [longer-term inter-company loans]; or*

*[text of (j) omitted]*

*...that do not involve the kinds of interests set out in subparagraphs (a) through (h).”*

<sup>8</sup> See the last sentence of note 7, *supra*.

it evident that wherever in Chapter Eleven it is not express, there is, nevertheless, an implied requirement that those investment interests be located in the host country as well.

145. Stated somewhat differently, had Chapter Eleven been intended to extend any protections to purely domestic investors, as Claimants suggest, it is evident to this Tribunal that the Article 1139(i) and (j) exclusions from “investment” would have had to be written much differently. Goods and services produced by a trade claimant are themselves invariably the products of investments, large or small, whether those investments are in the production or distribution of goods and services, and whether they are in the home country, the host country, a third country, or some combination of these. Accordingly, had there been an intention to protect domestic as well as foreign investment under any provisions of Chapter Eleven, including Article 1102, the Article 1139(i) and (j) exclusions could not have been written in such a sweeping way. Rather, the drafters would have had either to eliminate the exclusions entirely, revise the denial of benefits provision in Article 1113, or otherwise distinguish (perhaps by degree of industry integration) between categories of domestic investors. The fact that this was not done is further evidence to the Tribunal that Chapter Eleven is properly interpreted as protecting only foreign investment and investors, not foreign traders, no matter how integrated the particular industry operating on both sides of a border.
146. Article 1112(2) takes a similar approach in the context of services, a topic which is the subject of another chapter (Chapter 12) of the NAFTA. Article 1112(2) provides that a Party’s requirement that a cross-border service provider post a bond or other form of financial security as a condition of providing a service into the territory of that Party does not result in Chapter Eleven being applicable to the cross-border service itself. Article 1112(2) explicitly distinguishes between such cross-border activity, which is not subject to Chapter Eleven, and the bond or financial security that the cross-border service provider posts, which is made subject to Chapter Eleven.

147. The drafters of Chapter Eleven thus carefully differentiated between the underlying cross-border service and the commitment of financial resources pursuant to a requirement of the country to which the services are exported. The exclusion makes no exception for those cross-border service providers that have investments in their home country that enable them to provide the services, as this Tribunal would expect if Claimants' position were the intended one. The precise textual distinction of this Article, and the absence of provisions addressing home country investment, thus reinforce the conclusion that Chapter Eleven is not intended to apply to interests arising merely from cross-border trade activities.

**(ii) Other Probative Provisions of Chapter Eleven**

148. Other provisions of Chapter Eleven that explicitly overlay with Article 1102, or necessarily implicate the activities Claimants assert are protected by Article 1102(1), also are bereft of any indication of applicability to purely domestic investors. Articles 1111, 1109, and 1114 are of particular interest in this regard.

149. Article 1111 relating to "Special Formalities and Information Requirements," preserves the ability of host states to impose certain requirements on foreign investors and their investments without thereby violating Article 1102, reinforcing the view that Chapter Eleven, including Article 1102, is concerned only with foreign investors and foreign investments.

150. Article 1111(1) states that

*"nothing in Article 1102 shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with the establishment of investments by investors of another Party, such as a requirement that investors be residents of the Party or that investments be legally constituted under the laws or regulations of the Party, provided that such formalities do not materially impair the protections afforded by a Party to investors of another Party and investments of investors of another Party pursuant to this Chapter."*

The focus on foreign investors and foreign investment in this provision is manifest, and its reference to Article 1102 implies a similar focus for that Article.

151. Article 1111(2), which applies notwithstanding the provisions of Articles 1102 and 1103, permits NAFTA Parties to impose reporting requirements on foreign investors or their investments for analytical and statistical purposes.<sup>9</sup> There is no hint in these provisions of any concern for domestic investors or investment in this Article, or by implication, Articles 1102 or 1103.
152. Article 1109 relating to “Transfers,” while not referring specifically to Article 1102, is another example of a provision that this Tribunal considers would be significantly different if Article 1102(1) had been intended to cover domestic investors. Article 1109(1) requires that host countries permit the free transfer of profits from investment within its territory. Article 1109(3) goes on to prohibit a Party from requiring *its investors*<sup>10</sup> to transfer back profits from investments in the territory of another Party, or from penalizing them for failing to make such transfers – *i.e.*, from leaving such profits outside the home country. Had the NAFTA Parties intended for domestic investors to be protected by Chapter Eleven, even if just in Articles 1102 and 1103 as Claimants argue, Article 1109 would have needed a complementary provision to Article 1109(3)’s repatriation-

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<sup>9</sup> *E.g.*, the International Investment Trade in Services Survey Act (IITSSA), 20 U.S.C. § 3101 *et seq.* Claimants confused these types of reporting requirements, which apply only to foreign investors or their investments, with U.S. securities law requirements that apply to both U.S. and foreign companies seeking access to U.S. capital markets. And both disputing parties appear to have conflated questions of extraterritorial jurisdiction to prescribe and enforce norms of conduct over persons engaged in international business activity with the question of the territorial scope of States’ obligations under Chapter Eleven. However, all Article 1111 says is that it would not be a violation of national treatment or most-favored treatment requirements for a Party to require a foreign investor or its investment to provide certain information or observe certain formalities in the making of that investment.

<sup>10</sup> This appears to be the only provision of Chapter Eleven that imposes requirements on a NAFTA Party with respect to its own investors. The word “its” modifying “investors” makes this clear. Moreover, this obligation only makes sense if Chapter Eleven is intended to promote foreign investment, and in connection with that promotional goal, to protect foreign investors.



focused prohibition, prohibiting home countries from imposing limitations on the *expatriation* of profits.

153. Article 1114(2) is an acknowledgment that relaxations of domestic health, safety or environmental measures by a country are inappropriate ways of encouraging investment, and that NAFTA Parties may request consultations if they consider that another Party has improperly encouraged such investment. While lacking explicit territorial language, it is obvious that this provision assumes that the purpose of Chapter Eleven is the encouragement of foreign investment by investors of other NAFTA Parties. It is consequently both a further example of provisions in Chapter Eleven that we believe would have to be drafted quite differently if domestic investors could qualify for national treatment protection, as well as evidence of the intended purpose of Chapter Eleven.
154. These are just some of the examples of additional relevant context from other provisions of Chapter Eleven. In the Tribunal's view, these examples provide further textual evidence that Article 1102 Chapter Eleven is properly construed as requiring an investor to have made, or be seeking to make, foreign investment to receive the benefits of Chapter Eleven.

**(iii) Territoriality in Other Substantive Provisions in Section A of Chapter Eleven and Negotiating History**

155. The remaining substantive protections in Subchapter A of Article 11 do not reveal an intention by the NAFTA Parties to extend any of Chapter Eleven's protections to domestic investors, either. Stated somewhat differently, for the reasons detailed below, they do not suggest to this Tribunal any intention to provide extraterritorial benefits for NAFTA investors or impose extraterritorial obligations on NAFTA Parties.
156. A number of the investment protection provisions in Section A of Chapter Eleven (Articles 1104, 1005(2), and 1111(2)) focus on investors as well as investments.

Others (*e.g.*, Articles 1105(1), 1107, 1109(1) (as discussed above), and 1110) focus only on investments. Notably, these provisions are inconsistent – sometime even within the same article – in the extent to which they contain territorial language.<sup>11</sup> This inconsistency is particularly striking with respect to the investment-protection provisions.<sup>12</sup>

157. Claimants made much in their oral and written submissions of the fact that during the final drafting stages of the NAFTA, territorial references were removed from Articles 1101 and 1102 and remained untouched for some twenty drafts, while territorial references in other sections of Chapter Eleven were included or removed. Respondent has argued that any changes made during this “legal scrub” process should not be given much weight.
158. Recognizing that the “legal scrub” occurred at a late stage in the treaty negotiations, when the substance of the NAFTA was ostensibly settled, and that we have no official *travaux* on which to rely, the Tribunal nevertheless confesses to being troubled by the scrubbers’ apparently deliberate attention to territorial language in some parts of Chapter Eleven and not in others. Having no explanation for those changes, and having extensively studied the language of the final product, however, this Tribunal is persuaded that it is not fruitful to try to infer too much from this unexplained history, or from the presence or absence of territorial language in these other substantive protections of Section A of Chapter Eleven, as the drafting appears to be inconsistent and in many places not clearly or fully developed.<sup>13</sup>

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<sup>11</sup> Compare Article 1105(a) and (2), and Article 1111(1) and (2).

<sup>12</sup> Compare Articles 1104 (investors and investments), 1105(1) (investments), 1107 (investments), and 1111(1) (investments), none of which contain territorial language (except for one reference in 1107 relating to residency requirements for Board of Directors members), with Articles 1106: Performance Requirements (investments), 1109: Transfers (investments, except for 1109(3) discussed below, which applies to investors), and 1110: Expropriation (territorial language) (investments), all of which contain territorial language.

<sup>13</sup> For example, Article 1105(2) contains territorial language, but its language appears to have a descriptive function (“*measures it adopts in its territory owing to armed conflict or civil strife*”), or NAFTA/UNCITRAL Canadian Cattle Claims Award on Jurisdiction

159. This is especially true in that these substantive provisions of Chapter A represent the classic types of protections found in treaties designed to encourage and protect foreign investment. Moreover, to focus solely on the presence or absence of territorial language in a particular subsection misses, as this Tribunal sees it, the bigger picture that emerges from a detailed consideration of the text. This Tribunal finds no indication in any of these other provisions of an intention to provide extraterritorial protection to investors or their investments. Yet that is precisely what would result from giving effect to those substantive provisions that lack territorial language. This would be inconsistent with Article 1101, a provision of overriding effect. Ultimately the choice comes down either to concluding that certain territorial language in the substantive protections of Chapter Eleven is rendered superfluous (not contradicted) by virtue of Article 1101, or to finding extraterritorial obligations and benefits of significant scope by an isolated and non-contextual reading. This Tribunal believes the former to be the course more consistent with the body of the relevant evidence.

**e. Object and Purpose of the NAFTA, and in Particular, of Chapter Eleven**

160. This brings the Tribunal to the disputing Parties' debate about the purpose of the NAFTA. The disputing Parties have spilled much ink over the proper interpretation and role of Article 102 of the NAFTA.

161. That Article contains only one clause referencing investments, Article 102(1)(c), which speaks of "increas[ing] investment opportunities *in the territories* of the Parties." (italics ours).

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one that is perhaps meant to delineate the scope of available damages. As to the absence of territorial language in Article 1105(1), this Tribunal was not persuaded by Claimants' argument at the hearing that its absence was not significant given the NAFTA Free Trade Commission's subsequent interpretation of Article 1105. This argument ignored the disparity in the language of the two paragraphs of Article 1105, and the fact that the interpretation focused not on addressing the provision's territorial scope (which was assumed to relate only to foreign investment), but on the clarifying the substantive breadth of the protection provided by Article 1105.

162. Claimants seek to characterize this plural reference as ambiguous, and emphasize the importance of other goals, in particular free competition and market integration among the States Parties, in Article 102 and in the NAFTA's preamble [C I, ¶¶ 42-48]. Those goals, they argue, provide justification for reading Articles 1101 and 1102 as protecting investors who have only domestic investments, especially those who function in highly integrated markets, in the limited context of national treatment.
163. Respondent argues that NAFTA Chapter Eleven is no more than a BIT dropped into a free trade agreement, and would give limited effect to the provisions of Article 102 and the NAFTA's preamble, except for the investment protection goal.
164. Without disagreeing with the fundamental conclusion of the *Metalclad* Tribunal,<sup>14</sup> in this Tribunal's view, neither of the disputing Parties has gotten it quite right. Despite the fact, as we have seen, that many of its provisions are typical of bilateral investment protection treaties, NAFTA Chapter Eleven cannot be reduced simply to an ordinary bilateral investment treaty. For one thing, it is not bilateral but multilateral (thus leading to some of the linguistic challenges mentioned earlier). Second, and more fundamentally, it functions as part of a larger agreement that requires analysis of how the different parts of the treaty interrelate in a range of circumstances.
165. Chapter Eleven itself reflects this interdependence thoroughly. Beginning with its gateway, Article 1101, which carves out measures covered by Chapter 14 (Financial Services), Chapter Eleven is replete with provisions showing its interconnectedness to other parts of the NAFTA. Article 1112(1) makes Chapter Eleven in its entirety subordinate to the provisions of other NAFTA chapters

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<sup>14</sup> The *Metalclad* Tribunal interpreted Article 102(1)(c) as reflecting the NAFTA Parties' specific intent "to promote and increase cross-border investment opportunities," *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award ¶ 75 (Aug. 30, 2000).

where there are inconsistencies – thereby establishing the supremacy of other dispute resolution mechanisms in the event of conflict.<sup>15</sup> Article 1115 contains a savings clause that insures that the rights and obligations of the NAFTA States Parties under the dispute settlement provisions of Chapter 20 of the treaty are preserved, subject to the provisions of Article 1138. The latter article also clarifies the relationship between Chapter Eleven and national-security based actions under Article 2102. A number of other provisions of Chapter Eleven, including Articles 1116 and 1117, discussed earlier, import provisions from outside the Chapter. And provisions outside of Chapter Eleven – for example, the provisions of Article 2103 – affect an investor’s exercise of the rights granted by Chapter Eleven.

166. Thus, it is clear to this Tribunal that NAFTA Chapter Eleven cannot be viewed in isolation but must be considered in light of its larger context – the NAFTA as a whole. However, is that does not mean that Chapter Eleven itself must bear the whole weight of the diverse purposes set out in Article 102. Those purposes, it is clear, apply to the treaty in its complex entirety, and some are wholly irrelevant to Chapter Eleven. As one Chapter Eleven Tribunal, the *ADF Tribunal*, has stated, the NAFTA’s overall purpose clause is akin to a *lex generalis*, while the particular chapter is a *lex specialis*. [*ADF Group v. United States*, ICSID Case No. ARB(AF)/00/1, Award, ¶ 147 (Jan. 9, 2003).] The corollary is that particular segments of the treaty may reflect a much more limited set of purposes than the overall purposes clause sets forth. As Chapter Eleven lacks its own object and purpose clause, as a stand-alone investment treaty would likely have, its meaning must be discerned principally from textual analysis of the *lex specialis* and other relevant context.

167. At the hearing, Claimants were pressed to identify any free trade agreement that contained investment protections of the scope it argued for under the NAFTA –

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<sup>15</sup> Chapter 7 of the NAFTA, dealing with sanitary and phytosanitary measures, such as those on which the instant claims are based are asserted to be, contains a parallel override for provisions subject to that Chapter.

*i.e.*, that protected domestic as well as foreign investors. [Tr. pp. 125-127.] Claimants were unable to do so. Leaving aside customs unions and other arrangements going beyond free trade areas, there can be no question that Claimants' interpretation of Chapter Eleven would result in its providing an unprecedented scope of protection to investors. Although Claimants may be correct that the NAFTA may be in some respect *sui generis*, considerably more specific evidence of the NAFTA Parties' intent to achieve such a result is, in this Tribunal's view, necessary to support such a material expansion in the scope of Chapter Eleven.

168. Recalling especially the controversy that surrounded the passage of the NAFTA, it is more than passing strange to this Tribunal that such a sweeping expansion of the scope of investor protection would have gone unnoticed in the course of the NAFTA's adoption. Instead, all of the evidence adduced by the Parties contemporaneous with the adoption of the NAFTA, including the Statements of Administrative Action in Canada and the United States,<sup>16</sup> other official documents,<sup>17</sup> and commentary,<sup>18</sup> characterize purely Chapter Eleven in conventional terms as analogous to a bilateral investment treaty, with the purpose of encouraging the protection of foreign investment. Had there been an intention to protect domestic investments – something that surely would have been significant to all considering the treaty, as it would expand the scope of treaty obligations – this Tribunal would have expected to see this highlighted, and

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<sup>16</sup> Respondent's Memorial at pp. 7-8. Both the Canadian and U.S. statements seem unambiguous in indicating that Chapter Eleven is intended to protect cross-border investors and investments. Department of External Affairs, North American Free Trade Agreement: Canadian Statement on Implementation, in Canada Gazette 68, 147 (Jan. 1, 1994); North American Free Trade Agreement, Implementation Act, Statement of Administrative Action, H.R. Doc. No. 103-159, Vol. 1, 103d Cong., 1<sup>st</sup> Sess., at 589 (1993). There is no counterpart document in Mexico; however, the Mexican government position is clear by virtue of its submission in this case under Article 1128 and by virtue of its submissions in the *Bayview* case.

<sup>17</sup> Respondent cites to a report of the U.S. General Accounting Office, a report of the Congressional Budget Office, and publication of the Office of the United States Trade Representative, all of which are likewise explicit and unambiguous. [R I, p. 14-15; R II, p. 26-27 at notes 64-65.]

<sup>18</sup> See citations at note 28 of R I.

thoroughly analyzed. A failure to do so, especially in face of statements affirming a conventional scope and purpose for Chapter Eleven, would not just be a material omission, but an omission that would make the official statements that were made incomplete and misleading.

169. Respondent's equation of Chapter Eleven with a BIT does not do full justice to the structure and scheme of the NAFTA. Nevertheless, its fundamental point as concerns the purpose of Chapter Eleven must be sustained. The object and purpose of Chapter Eleven is only to protect foreign investors. Chapter Eleven does not give investors of one NAFTA Party who have not made, are not making, nor seeking to make, an investment in another NAFTA Party the ability to claim directly for damages for violations of rights granted by Chapter Eleven. The fact that the NAFTA indisputably seeks to promote economic integration among industries in the three States Parties does not mean that the border has been eliminated for purposes of investor protection, no matter how similar or integrated the industries on each side of the border may be.
170. In reaching this conclusion, the Tribunal gives limited weight to the authorities put forward by the Respondent involving the terms of subsequent free trade agreements. Our focus on textual analysis of the NAFTA and the mandates of the VCLT gives these authorities limited probative value to the issues at hand, except to demonstrate that certain terminology used in the NAFTA (*e.g.*, the term "free trade area") has no unique significance.

### **I.III. Subsequent Agreement and Practice (Article 31 (3) VCLT )**

#### **1. Arguments by Respondent**

171. As regards the subsequent practice, the Respondent asserts that the authentic interpretation of a treaty remains the *exclusive province of the State Parties*

*themselves* that may construct the treaty either expressly or *tacitly through subsequent conduct* (R II, p. 11; Tr. p. 47). VCLT Article 31 (3) is said to expressly provide that *any subsequent agreement or practice among the Parties to the Treaty regarding the interpretation of the Treaty shall [...] “be taken into account together with the context”* (Tr. pp. 25 *et seq.*). As there is no hierarchy among the elements of interpretation enumerated in VCLT Article 31, the subsequent practice of the Parties to the Treaty is a *critical element* to be considered, along with the Treaty’s text, context, and object and purpose (Tr. p. 26).

172. In this respect, the Respondent strongly opposes the Claimants’ point of view that subsequent statements of the Parties with regard to treaty provisions are “neither relevant nor credible”, pointing out that *the parties to the treaty are best situated to understand the sense of the treaty that they concluded*. This view is said to be confirmed by the award in the *Methanex* arbitration and by academic writers (R II, p. 13).
173. The Respondent submits that all three NAFTA Parties have confirmed its interpretation of Chapter Eleven’s purpose, which is to protect those investors and investments with respect to another NAFTA Party’s territory (R I, p. 7; R II, pp. 3, 12; Tr. p. 24). The Claimants’ argument that the Parties never formally agreed upon the interpretation of the NAFTA through the Free Trade Commission pursuant to Article 2001(2), is rejected by the Respondent, noting that the *suggestion [...] that a particular formality is required for there to be an agreement among the NAFTA Parties is incorrect* (R II, pp. 13–14, 303). A similar argument was allegedly rejected by the *Methanex* Tribunal (Tr. p. 50).
174. The Respondent, then, embarks upon alleged subsequent practice by the United States. First, the United States Statement of Administrative Action (“SAA”) which was submitted to Congress with the conclusion of the NAFTA is cited, stating that Chapter Eleven “applies where such firms or nationals make or seek to make investments in another NAFTA country” (R I, p. 7; R II, p. 15; Tr. pp. 25, 48). It further specifies that “Part A [of Chapter Eleven] sets out each



government's obligations with respect to investors from other NAFTA countries and their investments in its territory". Likewise, the United States General Accounting Office is said to characterize NAFTA Chapter Eleven in a report to Congress as relating to "any measure of a NAFTA Party that affects investments in its territory by an investor of another NAFTA Party." (R I, p. 8; Tr. p. 253). Additionally, it is contended that the United States' Congressional Budget Office noted in its analysis of the NAFTA that Chapter Eleven's national treatment article only "provide[s] that investors from one NAFTA country with an investment in another should be treated no less favorably [...]" (R II, p. 26; Tr. p. 43). In a similar manner, the Office of the U.S. Trade Representative purportedly concluded that the NAFTA enables investors "to go directly to international arbitration for disputes with the *host government*" (R II, p. 27; Tr. pp. 43, 253). And lastly, the United States additionally made a submission pursuant to Article 1128 in the *Bayview* arbitration, reiterating that the aim of NAFTA Chapter Eleven, which is also set forth in Article 102 (1) (c) only is to protect foreign investments and the investors who make them (Tr. pp. 44 *et seq.*).

175. Furthermore, in order to point out Canada's purported support of its interpretation, the Respondent relies on the Canadian Statement on Implementation of the NAFTA, in which the Canadian Government sets out that Chapter Eleven provides "a rules-based approach to the resolution of disputes involving foreign investors in Canada or Canadian investors abroad." (R I, p. 8; R II, p. 16; Tr. pp. 49, 306). Furthermore, the Respondent contends that in the *S.D. Myers* arbitration, Canada reiterated that *Chapter Eleven applies only to investors that have, or are seeking to make, investments in the territory of the disputing Party* (R I, p. 8; R II, p. 12; Tr. pp. 24 *et seq.*, 48 *et seq.*, 306 *et seq.*). Claimants' attempts to deny these findings are deemed to be unavailing (Tr. p. 48). The fact that Canada did not make a submission pursuant to Article 1128 to this arbitration allegedly *cannot serve as any basis for concluding that it disagrees with the interpretation proposed by the Respondent* (Tr. pp. 304 *et seq.*).

176. Third, the Respondent argues that Mexico similarly stated in the *Bayview* arbitration that “Chapter Eleven [...] aim[s] to promote and protect foreign investment” and that it does not intend “to protect [...] the property of one state[‘s nationals] in that same state”. Further, that Chapter Eleven “only applies to investments of investors of a Party in the territory of another Party, and to the investors of another Party insofar as they have made such investments.” (R I, pp. 8 *et seq.*; Tr. p. 171). This view is alleged to be confirmed by Mexico’s Article 1128 submission in this arbitration in which Mexico expressly “agrees with the United States that none of the NAFTA Parties undertook any obligation with respect to investments located outside of its territory or with respect to “investors” who are not seeking to make, are not making and have not made investments in its territory.” (R II, p. 12; Tr. pp. 24, 171).
177. Accordingly, the Respondent submits that the NAFTA Parties’ *concordant, common and consistent* State practice affirms Respondent’s interpretation of Chapter Eleven’s limited scope with regard to investors of a Party that have not invested, and do not intend to invest, in another NAFTA Party, but have invested only in the territory of their home State (R I, p. 9; R II, p. 14). Relying on the *ADF* award, the Respondent concludes that there can be *no more authentic and authoritative source of instruction*” (Tr. p. 47).

## 2. Arguments by Claimants

178. First, the Claimants criticize that the Respondent *embellishes and exaggerates the meaning of the alleged “subsequent practice”* of the NAFTA Parties by reserving an “*exclusive*” right to provide an “*authentic*” interpretation to itself and the other NAFTA Parties. Quite contrary to this allegation, it is contended that the subsequent practice of parties to a treaty may be used only to inform one’s interpretation of such treaty (C II, ¶ 46), particularly *where the meaning of treaty terms are unclear or obscure* (C II, ¶ 50). The Claimants reaffirm that the text of a treaty itself remains the best indicator of the Parties’ “original intent” as it remains *untainted by any revelation or revision by NAFTA Party officials*

*subsequent to their learning that a NAFTA claim has been commenced* (C II, ¶ 50).

179. Moreover, although the Respondent is said to be *well aware* that a specific mechanism exists under Article 2001 (2) in conjunction with Article 1131 (2) whereby the NAFTA Parties could agree on the interpretation of Articles 1101 (1) and 1102 (1) through the auspices of the Free Trade Commission, a statement under this mechanism was not issued in the present case (C I, ¶ 114; C II, ¶¶ 47, 51; Tr. p. 121). The Respondent's alleged attempt to *dictate a binding interpretation of the NAFTA text to this Tribunal* without reference to this mechanism is deemed by the Claimants to violate the *principle of effectiveness in treaty interpretation* (C II, ¶ 47). The Claimants further purport that if Respondent's interpretation was followed, this would lead to the possibility of labeling any comment of a NAFTA Party about a provision as "subsequent conduct", thereby demonstrating the "*authenticity*" of [a Party's] position in any given case (C II, ¶ 48). This allegedly disposes of the need to establish a tribunal under Chapter Eleven as the Parties are primarily responsible for the "*authoritative interpretation*" (C II, ¶ 49; Tr. pp. 123 *et seq.*).
180. The more so as the Claimants strongly believe that the Respondent *misleads the Tribunal in arguing that all three NAFTA Parties have agreed upon the issue* (C I, ¶ 114; C II, ¶ 51). Quite to the contrary, the Claimants strongly believe that there is no authentic interpretation, meaning *direct agreement of the Parties* here (Tr. p. 245). Particularly, the Claimants allege that the Government of Canada did neither issue any statements with relevance for this case in the *S.D. Myers* case nor in its "Statement on Implementation" (C II, ¶¶ 51 *et seq.*). Whereas the *S.D. Myers* arbitration is distinguished by its factual background and legal argument by the Claimants (Tr. pp. 115 *et seq.*; Tr. p. 247), the Canadian "Statement on Implementation" is explicitly said not to refer to the NAFTA as being a mere "investment treaty" (C II, ¶¶ 53 *et seq.*). Additionally, Canada did not issue any submission under NAFTA Article 1128 concerning this arbitration (Tr. pp. 121 *et seq.*, 243). Furthermore, the facts, claims and legal arguments submitted in the *Bayview* arbitration by Mexico are deemed by the Claimants as

to be *categorically different from this case* and, thus, Mexico's submission in that case is said to be not relevant either (C II, ¶¶ 60 *et seq.*; Tr. pp. 115 *et seq.*). In addition, submissions under Article 1128 are generally not binding (C II, ¶ 50).

### 3. The Tribunal

181. Article 31(3) of the Vienna Convention on the Law of Treaties provides that, in treaty interpretation:

*“There shall be taken into account, together with the context:*

*(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*

*(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation....”* (emphasis added)

182. In applying this customary rule of treaty interpretation, the Tribunal agrees with a leading commentator that “[t]he value and significance of subsequent practice will naturally depend on the extent to which it is concordant, common, and consistent. A practice is a sequence of facts or acts and cannot in general be established by one isolated fact or act or even by several individual applications.” Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2<sup>nd</sup> Ed. (Manchester University Press, 1984), 137.

183. Consistent with this rule, the Tribunal is of the view that, in interpreting a treaty, “reference may be made to ‘subsequent practice that clearly establishes the understanding of all the parties regarding its interpretation.’ ” Ian Brownlie, *Principles of Public International Law*, 5<sup>th</sup> Ed. (Oxford University Press, 1998, 635). The Tribunal is, furthermore, of the view that, as the rule states, any “subsequent agreement” or “subsequent practice” of the kind contemplated by the rule “*shall be taken into account, together with the context*” of the treaty terms subject to interpretation.

184. As to the issue of “**subsequent agreement**,” the Tribunal observes that Article 1131(2) of the NAFTA provides: “*An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this section.*” The “Commission“ to which this provision refers is the Free Trade Commission established by the NAFTA Parties under Article 2001(1) of the NAFTA “*comprising cabinet-level representatives of the Parties or their designees.*” Article 2001(2)(c) provides that, among its other responsibilities relating to the NAFTA, “[*t*]he Commission shall...*resolve disputes that may arise regarding its interpretation or application.*”
185. It is not disputed by either Claimants or Respondent that the NAFTA Parties have not sought an interpretation by the Commission on the preliminary issue before this Tribunal. Claimants see this as persuasive evidence that there is no “subsequent agreement” on this issue among the NAFTA Parties. Respondent argues that the formal process of interpretation under Article 1131(2) is not the only means available to the NAFTA Parties of reaching a “subsequent agreement.”
186. On this point, the Tribunal agrees with the Respondent. But has a “subsequent agreement” been reached on this issue by the NAFTA Parties by other means? The Respondent maintains that there is such a “subsequent agreement,” and points to its own statements on the issue, before this Tribunal and elsewhere; to Mexico’s Article 1128 submission in this arbitration; and to Canada’s statements on the issue, first in implementing the NAFTA, and, later, in its counter-memorial in the *Myers* case.
187. All of this is certainly suggestive of something approaching an agreement, but, to the Tribunal, all of this does not rise to the level of a “subsequent agreement” by the NAFTA Parties. Although there is no evidence on the record that any of the NAFTA Parties has voiced a discordant view on this issue, the Tribunal is mindful that there is limited experience thus far with many of the subtleties and implications of Chapter Eleven of the NAFTA. Too, the Tribunal notes the absence of any Article 1128 submission by Canada before this Tribunal. This

cannot be seen as evidence of Canadian support for the Claimants' position on this issue, but it also cannot be seen as evidence of Canadian opposition. The Tribunal concludes that there is no "subsequent agreement" on this issue within the meaning of Article 31(3)(a) of the Vienna Convention.

188. The question remains: is there "**subsequent practice**" that establishes the agreement of the NAFTA Parties on this issue within the meaning of Article 31(3)(b)? The Tribunal concludes that there is. Although there is, to the Tribunal, insufficient evidence on the record to demonstrate a "*subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions,*" the available evidence cited by the Respondent demonstrates to us that there is nevertheless a "*subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its applications....*"
189. On the record before this Tribunal, as cited by the Respondent above, there is evidence of a sequence of facts and acts that amounts to a practice that is concordant, common, and consistent. The Tribunal is of the view that this is "subsequent practice" within the meaning of Article 31(3) (c). And this "subsequent practice" confirms the Tribunal's interpretation of the ordinary meaning of Article 1101(1)(a) of the NAFTA, as set out above.

#### **I.IV. The Degree of Market Integration Is Irrelevant to the Preliminary Question**

190. Claimants' counsel has vigorously pressed the position that Claimants represent the exceptional case, due to the high degree of integration in the North American cattle market. Claimants have made extensive written and oral submissions on the subject of market integration. [*e.g.*, C I, Section II.B., pp. 8-14]. These, however, are factual issues, beyond the scope of the question put to this Tribunal

in the preliminary question. Furthermore, even if this Tribunal were to assume the accuracy and relevance of such information at this stage,<sup>19</sup> it proves too much.

191. First, such a position appears to conflate Articles 1102 and 1101, importing into the latter the “like circumstances” requirement of Article 1102. In this Tribunal’s view, such an importation would do far more violence to the interpretation of Article 1101 than a reading that focuses on the express requirements of Article 1101 with respect to the territorial scope of investments and the explicit linkage between investors and investments.
192. Second, despite Claimant’s attempts to characterize integration as the exceptional case, if a fundamental treaty purpose is integration, it is hard to see how that position could be correct. This Tribunal considers it much more likely that over time, virtually every industry operating cross-border, especially between Canada and the United States where a free trade agreement preceded the NAFTA, would be able to demonstrate a significant degree of integration.<sup>20</sup> Thus, there is no escaping the conclusion that the implications of the holding urged by Claimants for the scope of Chapter Eleven would be enormous.

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<sup>19</sup> Claimants’ proffered evidence goes primarily to the existence of an integrated North American cattle market, and to the increasing integration of that market post-NAFTA. It asserts, but does not prove, investments by Claimants in reliance on the promises of market access in the NAFTA. Respondent has vigorously disputed that there was any promise of market access in this context, so there are legal issues raised by these submissions as well as factual issues that are outside the scope of the preliminary question.

<sup>20</sup> The Tribunal would also expect to find extensive and increasing instances of integration or dependence between the other NAFTA parties, as the Claimants submitted was the case in *Bayview*. *Bayview Irrigation District et al v. Mexico*, ICSID Case No. B(AF)/05/01, Claimants’ Supplemental Memorial at 12-13 (Dec. 15, 2006). That Tribunal found that the Claimants’ dependence on supplies of goods from another NAFTA state was not sufficient to make the dependent enterprise an’ investor’ in that State. Award, ¶ 104.

## **I.V. Conclusion**

193. Although this Tribunal concludes that it has no jurisdiction to hear Claimants' claims, its decision today does not leave them with no remedy under the NAFTA. Their remedy lies not in the investor-state dispute resolution mechanism of Chapter Eleven, but in the state-to-state dispute resolution mechanism of Chapter 20 of the NAFTA. As such, it is for the government of Canada to pursue against the United States.<sup>21</sup> Nothing in this holding precludes the Canadian government from doing so. Indeed, taking Claimants' factual submissions at face value, Claimants would be wholly justified in pressing their government to seek recourse against the U.S. Government for the measures at issue. Although such a remedy may be less attractive to Claimants than a direct claim for damages, it is, in this Tribunal's view, the remedy provided by the NAFTA for a trade dispute of this nature.<sup>22</sup>

## **I. VI. Decisions in Other Cases as Supplementary Means of Interpretation (Article 32 VCLT)**

194. First, the Tribunal refers to its general considerations in section I.I.4. above regarding the relevance of decisions in other cases. In its implementation of these general considerations, hereafter, the respective arguments by the Parties in regard to the specific decisions are not repeated since they were summarized above in the context of the sections dealing with the issues examined, but only the respective references in the Parties' submissions are listed. Thereafter, in

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<sup>21</sup> In any such dispute, the provisions of Chapter Seven would also be highly relevant.

<sup>22</sup> This Tribunal recognizes that other Chapter Eleven tribunals have held that different provisions of the NAFTA may be cumulative, and that a measure may implicate remedies under both trade and investment chapter of the NAFTA. *See, e.g., SD Myers v. Canada*, ¶¶ 291-295; *Pope & Talbot*, p. 6-12. That is not the issue here. These cases, unlike the present case, involved claimants that were found by their respective Tribunals to have made foreign investments in the NAFTA Party adopting the challenged measure.



addition to some references to other decisions the Tribunal considered appropriate in earlier sections of this award, the Tribunal briefly considers the relevance of the major other decisions cited to by the Parties to the issues in this case.

## **1. Ethyl Corporation v. The Government of Canada**

### **1.1. References by Respondent**

195. The Respondent made references to the *Ethyl* arbitration in its First Memorial (R I, p. 3), in the Second Memorial on the Preliminary Issue (R II, p. 4) and additionally at the hearing (Tr. pp. 307 *et seq.*).

### **1.2. References by Claimants**

196. The Claimants referred to the *Ethyl* arbitration in the First Memorial (C I, ¶¶ 35, 41, 111, 113) and at the hearing (Tr. pp. 105, 125, 160, 265, 324, 326 *et seq.*).

### **1.3. The Tribunal**

197. Although the Chairman of the present Tribunal also chaired the Tribunal in the *Ethyl* case, the consideration of *Ethyl* for the purposes of the present case is restricted to what is known from the published text of the *Ethyl* decision and considered relevant in the present context.

198. It is true that, similar to the present case, the *Ethyl* case concerned trade between the United States and Canada, and that the Tribunal accepted jurisdiction.

199. However, further qualifications have to be recognized which distinguish *Ethyl* from the present case:

200. Factually, Ethyl did have investments, and indeed its own company, *i.e.*, *Ethyl Canada*, in the territory of the other state, *i.e.*, Canada, and challenged acts of Canada affecting that investment in Canada. With regard to Ethyl's claims for damages regarding its losses in the United States, the Tribunal made it clear that a distinction must be made between the locus of the breach and that of the damages suffered (Award § 71). As clarified in the Award, Ethyl claimed that an expropriation occurred inside Canada, but the investor's resulting losses were suffered both inside and outside Canada (Award §72). In the present case, Claimants only claim the latter without an investment in the other state.
201. But even in *Ethyl*, the Tribunal did not accept its jurisdiction regarding the losses outside Canada, but left that to a later consideration of the merits (Award § 73. The merits phase never occurred since the procedure ended earlier.). This is further clarified by Footnote 30 to the respective section of the Ethyl Award which expressly deals with the abstract principle disputed in the present case: "*Accordingly, the Tribunal does not decide what significance, if any, is to be attributed to the fact that Article 1106, like Article 1110, includes the phrase "in its territory", whereas Article 1102 does not.*"
202. It is therefore clear that the *Ethyl* Award is inconclusive for the issue of territoriality in the present case.

## **2. Methanex Corporation v. The United States of America**

### **2.1. References by Respondent**

203. References to the *Methanex* arbitration were made by the Respondent in its First Memorial (R I, pp. 4 *et seq.*), in the Second Memorial on the Preliminary Issue (R II, pp. 13 *et seq.*) and at the hearing (Tr. pp. 27, 50, 168 *et seq.*, and 174 *et seq.*, 239, 272, 284, and 292).

## 2.2. References by Claimants

204. The Claimants referred to the *Methanex* arbitration in the First Memorial (C I, ¶¶ 72 *et seq.*, and 97 *et seq.*) and in the Second Memorial on the Preliminary Issue (C II, ¶ 50) and confirmed them at the hearing (Tr. pp. 96, 171 *et seq.*, 243, 258, 261, and 265).

## 2.3. The Tribunal

205. There are two Awards in the *Methanex* case which deserve consideration in the context of the present case :

206. The First Partial Award of August 7, 2002 confirms the « gateway » function of Article 1101(1) to the effect that, in the view of the Methanex Tribunal, the powers of the Tribunal can only come into legal existence if the requirements of Article 1101(1) are met (Chapter I (4)(i)). As noted earlier, this supports indeed the conclusions of the present Tribunal in the sections above dealing with the ordinary meaning and object and purpose as well as the context of Article 1101(1)..

207. The second *Methanex* decision is the Final Award of August 3, 2005, on Jurisdiction and the Merits confirming, with supporting authorities, that a « *subsequent agreement* » in the sense of Article 31.3(a) VCLT need not be concluded with the same formal requirements as a treaty (Award Chapter B para 20). This is also the understanding of the present Tribunal.

208. However, this leaves open the question whether, indeed, in the present case, such a subsequent agreement between the NAFTA Parties regarding the interpretation of Article 1102(1) can be established. As discussed in paragraphs 184 - 189 *supra*, this Tribunal has doubts whether the actions of the NAFTA Parties can be considered as such a subsequent *agreement*, while different considerations apply to subsequent *practice* (Article 31.3.(b) VCLT).

209. The Parties have exchanged arguments at some length (particularly during the hearing Tr. pp. 168 et seq.) as to whether the *Methanex* Awards can give support to their respective arguments concerning Articles 1102 and 1101 for the interpretation of the terms « *relating to* » in Article 1101.1 and in view of the term « *legally significant connection* » used by the Methanex Tribunal. Though the test of a « *legally significant connection* » used by the Methanex Tribunal (1st Award paragraph 147) would also in the present case lead to a denial of jurisdiction, the present Tribunal finds, because Article 32 VCLT only permits the recourse to supplementary means of interpretation such as decisions of other tribunals *in order to confirm the meaning resulting from the application of Article 31*, that the facts and the legal arguments in Methanex were not similar enough to those in the present case to provide guidance in that context: Methanex did have investments in the United States ( a shattered factory in Louisiana and a company in Texas ), the dispute concerned the ban of a certain substance not produced by Methanex to which Methanex only manufactured an additive, the Methanex Tribunal refused jurisdiction regarding the whole of Methanex's claims and only joined to the merits the consideration of certain allegations relating to « *intent* » underlying the US measures, and then in its Award on the merits the Tribunal accepted the FTC's interpretation dated July 31, 2001, as a « *subsequent agreement* » falling under Article 31.3(a) VCLT (Award para 21).

### **3. Philippe Gruslin v. Malaysia**

#### **3.1. References by Respondent**

210. The Respondent referred to the *Gruslin* arbitration in its First Memorial (R I, pp. 10 et seq.) and in the Second Memorial on the Preliminary Issue (R II, pp. 27 et seq.) and restated them at the hearing (Tr. pp. 31 et seq. and 300 et seq.).

### 3.2. References by Claimants

211. Reference to the *Gruslin* arbitration were made by the Claimants in the First Memorial (C I, ¶¶ 108 *et seq.*), in the Second Memorial on the Preliminary Issue (C II, ¶¶ 97 *et seq.*) and at the hearing (Tr. pp. 112 *et seq.*, 144, and 324 *et seq.*).

### 3.3. The Tribunal

212. The *Gruslin* Award has been issued in an ICSID case with the consent to arbitration stemming from the Intergovernmental Agreement (IGA) between the Belgo-Luxemburg Economic Union and Malaysia. Thus it does not deal with the application and interpretation of the NAFTA and can only be considered as to whether legal considerations in that case can be helpful for those in the present case.
213. A further distinction to the present case is that, in the *Gruslin* case, the Claimant did not claim that it made an investment in the other country but that it invested in a mutual fund in Luxemburg which then in turn did invest in Malaysia so that an indirect investment in the territory of the other state was at stake. In the present case, the Parties expressly agree and the Preliminary Issue confirms that no indirect [?] investment by Claimants is at stake.
214. With regard to a territorial qualification, a further difference is that the preamble of the IGA expressly mentions « *investments ... in the territory of the other Contracting Party* » as the intended object of protection, while the preamble of NAFTA does not which might be explained by the fact that NAFTA has a much broader scope and only Chapter Eleven deals with investments. One thus might compare NAFTA Chapter Eleven to the IGA which, in essence, is a bilateral investment treaty, Article 1101 with the title « *Scope and Coverage* » could be considered as comparable to the function of a preamble to Chapter Eleven. But even then a difference remains because Article 12 of the IGA titled *Application of Agreement* has an introductory function comparable to NAFTA Article 1101

and does contain a much less territorial qualification « ...*shall apply to investments made in the territory of either Contracting Party ...by nationals of the other Contracting Party* ». Since Article 1101 does not have such a clear territorial qualification, we are back to the issue that Article 1101.1 has no territorial qualification in paragraph (a) regarding investors, but does have one in paragraph (b) regarding investments.

215. To some extent comparable between *Gruslin* and the present case is the question, arising in both cases, of what conclusions can be drawn if some treaty provisions contain an express territorial requirement and some do not. Claimants in both cases have argued, and in fact that would seem to be the primary approach, that such a difference in wording must have some meaning and that can only be that, where the territorial qualification is missing the provision also covers investments not made in the territory of the other Contracting State. However, the Sole Arbitrator in *Gruslin* did not accept that interpretation, but rather concluded that, in spite of the lack of a territorial qualification in Article 10 IGA, that provision should still be understood to cover only investments as they are the subject matter of the rest of the IGA, *i.e.*, only those in the territory of the other Contractual State (Award §§ 13.8 to 13.11). Since, as seen above, the IGA in *Gruslin*, by its preamble, is clearer than NAFTA in defining the protected investments as only those in the territory of the other State, not too much guidance can be drawn from that interpretation of the Sole Arbitrator in *Gruslin* for the present case. However, on the basis of the « gateway » function of NAFTA Article 1101, it can be seen as giving some support to the similar interpretation this Tribunal has given above to NAFTA Article 1101.

#### **4. Bayview Irrigation District et al. v. United Mexican States**

##### **4.1. References by Respondent**

216. References to the *Bayview* arbitration were made by the Respondent in its First Memorial (R I, pp. 8 *et seq.*) and in its Second Memorial on the Preliminary Issue NAFTA/UNCITRAL Canadian Cattle Claims Award on Jurisdiction

(R II, p. 12). They were supplemented by Respondent's oral presentation at the hearing (Tr. pp. 19, 27, 29, 32 *et seq.*, 37 *et seq.*, 44, 48 *et seq.*, 51 *et seq.*, 54 *et seq.*, 170 *et seq.*, 278, 284, 291, 293 *et seq.*, 305 *et seq.*, 317, and 320).

#### **4.2. References by Claimants**

217. The Claimants made references to the *Bayview* arbitration in the First Memorial (C I, ¶ 84), in the Second Memorial on the Preliminary Issue (C II, ¶ 40, 60 – 75, 131) and supplemented them during their oral presentation at the hearing (Tr. pp. 99, 114 *et seq.*, 122, 197, 240, 262, 267, 269, and 321 *et seq.*).

#### **4.3. The Tribunal**

218. The *Bayview* Award of June 19, 2007 is the most recent of the decisions which may be considered as having some relevance for the issues at stake in the present case and thus the Parties were only in a position to submit their views in this regard in a late stage of the procedure and particularly at the hearing.
219. The Award's consideration of NAFTA Article 1101 and its function the scope and coverage of the entire Chapter Eleven (Award paragraphs 85 *et seq.*) are similar to and support the above considerations of the present Tribunal on the same subject. However, this Tribunal has some difficulty in following the order of reasoning in the *Bayview* Award regarding the question whether only an investment in the other State can trigger jurisdiction, because the *Bayview* Tribunal seems to start its respective examination with the *travaux préparatoires* (Award paragraph 95) while, in the view of the present Tribunal, Article 31 VCLT calls for a primary examination of the ordinary meaning of the terms of the treaty in their context and in the light of its object and purpose while the *travaux* may only be considered at a later stage as supplementary means of interpretation according to Article 32 VCLT.

220. The factual situation in *Bayview*, *i.e.*, that water is supplied across the border, is not quite the same as in the present case where the export of meat in what is alleged to be an integrated market is at stake. And in *Bayview*, the Claimants submitted the argument that they owned the water flowing through Mexico and that was their investment in that State, an argument with no counterpart in the present case.
221. It may well be argued that *Bayview* is different because, as Claimants in the present case point out, the *Bayview* case was about the treatment owed under NAFTA Article 1105 while the present case is not (C/II Paragraph 68). Nevertheless, the *Bayview* Tribunal's considerations regarding the relevance and interpretation of the territorial requirement in Article 1101(b) and its conclusion that, in order to be an « investor » under Articles 1101(a) and 1139, one must make an investment in the territory of another NAFTA State, not only in one's own (Award, ¶ 105), support the above conclusions of the present Tribunal.
222. So does the reliance in *Bayview* on the subsequent practice of all three NAFTA States in this regard (Award ¶¶ 106 *et seq.*).

## **5. Conclusion**

223. After a review of the relevant decisions in other cases as supplementary means of interpretation (Article 32 VCLT) it can thus be concluded that some of these decisions provide support to the interpretation the present Tribunal has chosen in earlier sections above of this Award, and that none of these decisions has been found to contradict this Tribunal's interpretation.

## **I.VII. Considerations Regarding Costs**

224. Originally, only Respondent had submitted a Claim for Arbitration Costs. In reply to a respective question by the Chairman at the end of the hearing,



Claimants announced a Cost Claim as well. The Chairman's letter after the hearing of October 16, 2007 recalled the respective agreement on Cost Claims as follows:

*2. By November 8, 2007, both the Claimants and the Respondent shall submit Claims for their costs of arbitration.*

*3. By November 15, 2007, the Parties may submit comments regarding the cost claim submitted by the other side.*

## **1. Relief Sought by Respondent**

225. The Respondent requests the Tribunal to issue an award as follows (R I, p.20; R II, p. 34)

*“The United States further requests that, pursuant to Article 40 of the UNCITRAL Arbitration Rules, the Tribunal require Claimants to bear all costs of the arbitration, including costs and expenses of counsel, and issue an award making Claimants jointly and severally liable for costs.”*

226. According to the agreement recorded above, Respondent submitted a quantified Claim for Costs by November 8, and Claimants submitted comments thereon by November 15, 2007.

## **2. Relief Sought by Claimants**

227. The Claimants request the Tribunal to issue an award as follows (Tr. p. 334)

*“MR. HAIGH: Thank you for the question, Mr. President and the Claimants would take the position that, if it was successful on this application, it should receive its costs.”*

228. According to the agreement recorded above, Claimants submitted a quantified Claim for Costs by November 8, and Respondent submitted comments thereon by November 15, 2007.

### **3. The Tribunal**

229. The Tribunal notes that NAFTA Article 1135.1 provides that it may *award costs in accordance with the applicable arbitration rules*. Article 40 of the UNCITRAL Rules makes a distinction between the costs of arbitration and the costs of legal representation.

230. Its paragraph 1 provides:

*Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.*

Applying this provision, though Claimants have been unsuccessful in their application regarding the Preliminary Issue, the Tribunal considers it *reasonable, taking into account the circumstances of the case*, that each Party bears 50% of the costs of arbitration.

231. Article 40.2 of the UNCITRAL Rules provides:

*With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.*

232. Applying this provision, though Claimants have been unsuccessful in their application regarding the Preliminary Issue, *taking into account the circumstances of the case*, the Tribunal, using its discretion under this provision, considers it reasonable and concludes that each Party shall bear its own costs of legal representation.

## **J. Summary of Tribunal's Conclusions**

233. Taking into account all of the above considerations, therefore, this Tribunal concludes that the question raised by what the Parties have defined as the *Preliminary Issue* must be answered in the negative :

This Tribunal does not have jurisdiction to consider claims under NAFTA Article 1116 for an alleged breach of NAFTA Article 1102(1) where all of the Claimants' investments at issue are located in the Canadian portion of the North American Free Trade Area and the Claimants do not seek to make, are not making and have not made any investments in the territory of the United States of America.

234. This conclusion of the Tribunal brings into effect the further sections of the Parties's text of the *Preliminary Issue*:

*The Parties agree that a negative determination of this question will dispose of all of claimants' claims in their entirety.*

*The parties also agree that any other objections of a potentially jurisdictional nature shall be reserved for a single merits phase should the claims not be dismissed at the preliminary phase."*

**( The Decisions of the Tribunal follow hereafter on a separate page)**

## K. Decisions


1. This Tribunal does not have jurisdiction to consider claims under NAFTA Article 1116 for an alleged breach of NAFTA Article 1102(1) where all of the Claimants' investments at issue are located in the Canadian portion of the North American Free Trade Area and the Claimants do not seek to make, are not making and have not made any investments in the territory of the United States of America.
2. The Claimants (together) and the Respondent shall each bear 50% of the costs of arbitration.
3. The Claimants and the Respondent shall each bear their own costs of legal representation.
4. According to the respective agreement of the Parties, the negative determination under section 1 above hereby disposes of all of Claimants' claims in their entirety.


Place of Arbitration: Washington, D.C.

Date of this Award: January 28, 2008

Signatures of the Tribunal:

  
Mr. James Bacchus

  
Ms. Lucinda A. Low

  
Prof. Dr. Böckstiegel, Chairman